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IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

STEVEN PRESCOTT; ROBERT F. BERRY; CHERYL JONES; KAREN PIERCE; AND CHRISTINE M. TURNEY,

Petitioners,

v.

COUNTY OF EL DORADO; SHARON LIBICKI; AND EL DORADO COUNTY EMPLOYEES ASSOCIATION, LOCAL NO. 1,

Respondents.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF *CERTIORARI*

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October 2002

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119 pp

QUESTIONS PRESENTED

I. Do public employees possess standing to challenge, as void as against Federal constitutional law and public policy, the legality of provisions of the collective bargaining agreement governing their terms and conditions of employment?

II. May a public employer agree to be indemnified by a labor union for the public employer's liability for violating its nonunion employees' constitutional rights when it seizes compulsory union fees in violation of this Court's decision in *Teachers Local No. 1 v. Hudson*, 475 U.S. 292 (1986)?

PARTIES TO THE PROCEEDINGS BELOW

There were no parties to the proceedings in the court whose judgment is sought to be reviewed other than those named in the caption.

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STEVEN PRESCOTT; ROBERT F. BERRY; CHERYL L. JONES; KAREN PIERCE; AND CHRISTINE M. TURNEY,

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v.

COUNTY OF EL DORADO; KATHY LIBICKI; AND EL DORADO COUNTY EMPLOYEES ASS'N, LOCAL NO. 1,

Respondents.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF *CERTIORARI*

Petitioners Steven Prescott, Robert F. Berry, Cheryl L. Jones, Karen Pierce, and Christine M. Turney respectfully pray that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on 1 August 2002.

OPINIONS BELOW

The panel opinion sought to be reviewed (Appendix ("App.") A at 1a) is reported at 298 F.3d 844. The judgment (App. B at 6a), and opinion and order of the United States District Court for the Eastern District of California on Petitioners' and Respondents' Cross-Motions for Summary Judgment (App. C at 7a) are unreported. Also included are the panel decision of the Ninth Circuit (App. D at 19a), on remand from this Court, reported at 204 F.3d at 984, the original panel decision of the Ninth Circuit (App. E at 22a), reported at 177 F.3d 1102, and the District Court's unreported original judgment (App. F at 47a) and opinion and order (App. G at 48a).

JURISDICTION

The court of appeals entered its judgment on 1 August 2002. This petition is timely under Supreme Court Rule 13.1. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (West 1993).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article III, and the First and Fourteenth Amendments, of the United States Constitution, Title I of the Civil Rights Act of 1871, 42 U.S.C. § 1983, and § 3502.5(a) of the California Government Code. Their pertinent text is set out in Appendices H-L at 66a-70a.

STATEMENT OF THE CASE

Like this Court's earlier consideration, *Prescott v. County of El Dorado*, 528 U.S. 1111 (2000), this case involves: (1) the standing of public employees to challenge provisions of the agreement governing their terms and conditions of employment; and (2) whether a public employer may contract away (to the union benefitting from its actions) liabilities arising from its enforcement of an agency shop scheme which fails to comply with "the constitutional requirements for the Union's collection of agency fees." *Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 310 (1986).

This civil rights action, brought under 42 U.S.C. § 1983, sought and obtained declaratory, injunctive, and other relief to prevent and redress violations of Petitioners' constitutional rights to be free from unlawful seizures of compulsory union fees. *See generally Hudson*, 475 U.S. at 306-10. Included within their Complaint, Petitioners Steven Prescott, *et al.* ("the employees"), also challenged the "indemnification provision" of the memorandum of understanding ("MOU") between Respondents County of El Dorado ("County") and El Dorado County Employees Association, Local No. 1 ("EDCEA"), alleging that it is void as against public policy and unenforceable (Record ("R.") 1, Complaint, ¶¶ 14 and 31, and Exhibit A, Article 4, § 3(J)). Applying *Hudson*, the lower courts decided most of the employees' claims and entered judgment largely in their favor. However, the lower courts twice declined to address the indemnification issue, declaring that the employees lack standing to challenge this section of the MOU governing their terms and conditions of employment. *See* App. A at 3a-5a, 298 F.3d at 845-47; App. E at 41a-43a, 177 F.3d at 1111-12; App. G at 64a-66a.

I. The Facts.

The employees are employed by the County in a bargaining unit represented by EDCEA. EDCEA is a "recognized employee organization" and the County is a "public agency" within the meaning of California's Meyers-Milias-Brown Act ("MMBA"), Cal. Gov't Code § 3501(b) and (c). The employees are not union members, and were not, when "agency fees" were seized from their pay. App. A at 2a-3a.

Pursuant to the MMBA, Cal. Gov't Code § 3502.5(a), the EDCEA/County MOU imposed a forced-unionism obligation (entitled "Fair Share") by which the County agreed to deduct fees from the wages of all bargaining unit employees who did not join EDCEA, and to forward those fees to EDCEA. App. A at 2a-3a. Included in this section of the MOU was an indemnification provision, as follows:

> Local 1 shall defend, indemnify and hold harmless, release and save the County and its agents and employees against any and all claims, demands, suits, orders, judgements or other forms of liability that shall arise out of or by reason of, action taken or not taken by the County under this Agreement. This includes but is not limited to the collection and procedures for collection of fair share fees and reasonable cost of County's attorney fees and costs along with reasonable cost of management preparations [*sic*] time as well.

Id. at 3a, 298 F.3d at 845.

In April 1995, EDCEA sent a notice to the employees, purportedly in compliance with *Hudson*'s requirements. On 12 May 1995, the County seized initiation fees and agency fees from each employee's bi-weekly salary, forwarding the fees to EDCEA's affiliate, Public Employees Union, Local No. 1.

Respondents failed to comply with all of the procedural protections required by this Court's decision in *Hudson* before fees were seized. *Prescott v. County of El Dorado*, 915 F. Supp. 1080, 1091-92 (E.D. Cal. 1996). As adjudicated by the lower courts, EDCEA's notice and procedure violated *Hudson*'s three requirements, 475 U.S. at 310, failing to provide: (1) "an adequate explanation of the basis for the fee" by failing to provide audited financial disclosure, App. E at 29a-34a, 177 F.3d at 1106-09; (2) "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker," as EDCEA's challenge procedure would not occur until more than a year after the first fee seizure, 915 F. Supp. at 1091, and the union required specific objections submitted "under penalty of perjury," App. G at 63a-64a (permanently enjoining EDCEA from imposing requirements); and (3) "an escrow for the amounts reasonably in dispute while such challenges are pending," as EDCEA escrowed only 4% of the fee seized, App. E at 37a-40a, 177 F.3d at 1110-11.

Respondents County and Kathy Libicki (the County's Director of Human Resources) took no steps to comply with *Hudson*'s requirements, relying wholly upon EDCEA's representations that it had done so. The County and Libicki initially claimed that they undertook no independent review to confirm EDCEA's representations that it had complied with *Hudson*'s requirements before seizing agency fees from the employees. R. 23, Exhibit 3, page 2, Admission No. 3; R. 92, pages 24-25; *see also* R. 90, ¶ 23 (failing even to ascertain whether the notice was sent to all "potential objectors," *Hudson*, 475 U.S. at 306). However, later discovery revealed that they had concluded that EDCEA's financial disclosure probably did not comply with *Hudson*'s requirements. R. 92, pages 35-36 and Exhibit 6A; *see also* R. 90, ¶ 22. Nevertheless, the County enforced the forced-unionism agreement in the belief

that the indemnification agreement protected it from all liability to the employees.

II. Prior Proceedings and Proceedings Below.

The employees filed their Complaint in October 1995, seeking declaratory and injunctive relief, and damages, on the grounds that Respondents were enforcing their "agency shop" scheme in violation of *Hudson*, and that the indemnification provision of the MOU is void as against public policy.

After preliminarily enjoining all fee seizures, *Prescott*, 915 F. Supp. at 1092, the District Court, on 26 January 1998, entered its order, App. G at 48a-68a, and its judgment, on 1 April 1998, largely in favor of the employees, App. F at 47a. The District Court permanently enjoined EDCEA from utilizing portions of its *Hudson* procedure. App. G at 63a-64a. District Court rulings that EDCEA's unaudited financial disclosure and escrow were adequate under *Hudson* were reversed on appeal. App. E at 29a-34a, 37a-40a, 177 F.3d at 1106-09, 1110-11, *cert. granted, vacated, remanded*, 528 U.S. 1111 (2000), *reinstated in pertinent part*, App. D at 20a-21a, 204 F.3d at 984.

As to the employees' claim that the indemnification provision of the MOU is void as against public policy and unenforceable, the District Court *sua sponte* declared that the employees lack standing to challenge this term of the MOU governing their terms and conditions of employment. App. G at 64a-66a. Specifically, the District Court found that the employees had "not demonstrated any of the three prerequisites to standing." The court reasoned that the employees' injury "is the result of the Union's [*sic*] conduct, and is traceable to the hold harmless agreement in only the most indirect fashion." *Id.* at 66a. The employees appealed, R. 54, attacking, *inter alia*, the

District Court's ruling that they lack standing to challenge the indemnification provision. App. E at 41a, 177 F.3d at 1111.

Acknowledging "that [the employees] suffered some injury when the fees were deducted from [their] paycheck[s]," the first Court of Appeals panel nevertheless affirmed the District Court's standing ruling. *Id.* at 42a, 177 F.3d at 1112 (identifying injury as failure to comply with *Hudson*'s standards; injury results from union's conduct). Thus, both the District Court and the original panel denied any nexus between the indemnification provision and the County's seizure of fees from the employees. *Id.*, 177 F.3d at 1112.

The original panel's denial was rooted in its conclusion that the employees were injured not by the County's illegal fee seizures, but because "fee deduction procedures were [not] properly followed." It then concluded that this miscast "injury" was not "fairly traceable to the agreement," and that it was "speculative" to conclude that "striking of the agreement would redress or prevent the injuries . . . suffered." *Id.*, 177 F.3d at 1112.

The employees petitioned this Court for a writ of *certiorari*. This Court apparently determined either "intervening developments, or recent developments that [it] had reason to believe the court below did not fully consider, reveal[ed] a reasonable probability that the decision below rest[ed] on a premise that the lower court would reject if given the opportunity for further consideration." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). This Court granted the petition, vacated the decision below, and, on 18 January 2000, remanded the case "for further consideration in light of *Friends of the Earth, Inc. v. Laidlaw*," 528 U.S. 167 (2000). 528 U.S. 1111 (2000).

Further discovery on remand revealed the County knew, prior to seizing the compulsory fees from the employees' wages, that EDCEA's financial disclosure "may not meet [the] standard of 'legally audited' financial disclosure." R. 92, pages 35-36 and Exhibit 6A (original emphasis). Nevertheless, upon cross-motions for summary judgment, the District Court again held that the employees lack standing to challenge the validity of the indemnification clause, App. C at 15a-18a, and dismissed the case, App. B at 6a. The employees again appealed. R. 99.

Retreating from the concession of its predecessor panel, App. E at 42a, 177 F.3d at 1112; *but see Hudson*, 475 U.S. at 310, the second panel refused to acknowledge that employees are injured by the illegal seizure of their property. Instead, the second panel—like the District Court, App. C at 16a—identified the injury as a failure to comply with *Hudson*'s standards and affirmed the District Court's standing ruling. App. A at 4a-5a, 298 F.3d at 846-47.

Like the District Court, the panel recast the Complaint, stating that "[t]he only cognizable injury the plaintiffs allege is that the union did not give them adequate notice of the basis of the fees." *Id.* at 2a, 298 F.3d at 845; *see also id.* at 3a-4a, 298 F.3d at 846 ("The only injury they alleged was that the union failed to comply with the requirements of *Hudson* to provide notice of the basis of the agency fees . . . and to maintain an adequate portion of collected fees in escrow pending fee arbitration."). However, the Complaint five times identifies the seizure of agency fees as the source of the employees' injuries. R. 1, ¶¶ 15, 19, 20, 21 & 24.[1]

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[1] The panel likewise disregards prior proceedings herein, for in addition to the failure to provide "adequate notice," the District Court had adjudicated four distinct procedural deficiencies. *See* page 5, *supra*.

Based upon this misapprehension of the Record and prior proceedings, and the flawed premise that inadequate notice—and not the illegal seizure of property—causes injury, the panel declared that the employees had not "met the redressability requirement for standing," because it was merely "speculative" that the declaratory and injunctive remedy sought would not "prevent future violations." App. A at 4a, 298 F.3d at 846.

The panel also asserted that a public employer is not liable when it seizes fees from employees absent compliance with "the constitutional requirements for the . . . collection of agency fees." *Hudson*, 475 U.S. at 310. The panel concluded that a public employer "has no responsibility for ensuring the adequacy of the notice; that is the union's responsibility." App. A at 4a, 298 F.3d at 846 (citing *Foster v. Madhesian*, 268 F.3d 689, 694 (9th Cir. 2001)).

REASONS FOR GRANTING THE WRIT

I. THE IMPORTANT QUESTION AS TO EMPLOYEES' STANDING DIRECTLY ADDRESSES THE POWER OF INDIVIDUALS TO PROTECT THEMSELVES AGAINST THE GOVERNMENT'S IMPOSITION OF UNLAWFUL TERMS AND CONDITIONS OF EMPLOYMENT.

At first blush, this case appears to present a routine standing issue, addressed frequently by this Court. *See Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 763, 771-78 (2000); *Clinton v. City of New York*, 524 U.S. 417 (1998); *Federal Election Comm'n v. Akins*, 524 U.S. 11 (1998); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Allen v. Wright*, 468 U.S. 737 (1984); *Los Angeles v. Lyons*, 461 U.S. 95 (1983); *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976); *Warth v. Seldin*, 422 U.S. 490 (1975); *Sierra Club v. Morton*, 405 U.S. 727 (1972). In these cases, among many others, this Court has repeated the familiar tripartite showing required to establish standing: "A plaintiff must allege [1] personal injury [2] fairly traceable to the defendant's allegedly unlawful conduct and [3] likely to be redressed by the requested relief." *Allen*, 468 U.S. at 751 (citing *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 471-76 (1982)).

However, the lower court's treatment of standing here is **not** routine. *Prescott v. County of El Dorado*, 528 U.S. 1111 (2000). By misdefining the employees' injury, the Ninth Circuit writes out of civil rights law the government's duty to refrain from violating nonunion employees' constitutional rights, failing to apply this Court's clearly-enunciated standards, *see Hudson*, 475 U.S. at 307 n.20 ("the government and union have a responsibility to provide procedures that minimize th[e]

impingement [on First Amendment rights] and that facilitate a nonunion employee's ability to protect his rights") as well as those of virtually every other Circuit addressing this issue. Consequently, the employees face the prospect of future violations of their constitutional rights by both illegal agency fee seizures absent compliance with the "constitutional requirements for the . . . collection of agency fees," *id.* at 310, and by compelled subsidization of the public employer's defense against their successful lawsuit challenging past violations of their constitutional rights.

A. The Conflict with Decisions on the Injury-in-Fact Inflicted by Government Enforcement of an Agency Shop Scheme.

The panel's decision conflicts with this Court's standing decisions, because it conflicts with this Court's forced-unionism jurisprudence. Although nonmembers are injured by the public employer's seizure of agency fees from their wages, the panel radically abstracted their injury, attributing their "injury in fact" to inadequate notice under *Hudson*. App. A at 2a, 298 F.3d at 845. Thus, the panel premised its decision on the implausible proposition that the contents of a union's notice—rather than the seizure of his or her property—injures an employee.

The Ninth Circuit has applied this analysis in a series of cases, beginning with the first decision herein, App. E at 41a-43a, 177 F.3d at 1111-12, and culminating in its decision on remand from this Court. App. A at 4a; *see also Foster v. Madhesian*, 268 F.3d 689, 694 (9th Cir. 2001); *Harik v. California Teachers Ass'n*, 298 F.3d 863, 870 (9th Cir. 2002) (reversing judgment against public officials for seizing fees absent *Hudson* compliance).

The panel's conclusion defies this Court's mandate that it is the public employer's responsibility, before it seizes fees from "potential objectors," to ensure that *Hudson*'s standards are satisfied. *Hudson*, 475 U.S. at 306-07 & n.20; *see also Knight v. Kenai Peninsula Borough Sch. Dist.*, 131 F.3d 807, 817 (9th Cir. 1997) (miscast by both the *Foster* and the *Prescott* panels).

1. The Conflict with This Court.

Hudson holds that an employer's seizure of nonmembers' fees is the constitutionally-injurious act, rejecting the argument that only the union's expenditure of nonmembers' fees injures them. Proceeding from the principle "that requiring employees to support the collective-bargaining representative 'has an impact upon their First-Amendment interests'" (quoting *Abood v. Detroit Board of Education*, 431 U.S. 209, 222 (1977)), this Court identified a two-fold violation in any forced-unionism scheme: that it "may well 'interfere in some way with an employee's freedom[: (1)] to associate for the advancement of ideas, or [(2)] to refrain from doing so, as he sees fit.'" *Hudson*, 475 U.S. at 301. This Court reiterated that "the agency shop itself impinges on the nonunion employees' First-Amendment interests," noting that an "appropriately justified advance reduction" of the fee is required. *Id.* at 309. Recognition that it is the taking which injures the constitutional rights of nonmembers was cemented by this Court's holding establishing "the constitutional requirements for the . . . **collection** of agency fees." *Id.* at 310 (emphasis added); *cf. Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("loss of First Amendment freedoms, for even minimal periods of time, **unquestionably** constitutes irreparable injury") (emphasis added).

While declining to consider the case "through the prism of the procedural due process protections necessary for deprivations of property," this Court recognized that the infringement is dual, because "the procedures required by the First Amendment also provide the protections necessary for any deprivation of property." *Hudson*, 475 U.S. at 304 n.13. It therefore rejected the union's argument that "any valid constitutional objection to [its] procedure," was addressed by escrow of all monies seized from nonmembers. *Id.* at 309. This principle was again recognized when this Court rejected the argument that "[i]llegality depends on the *spending* of compelled agency fees for ideological purposes . . . not simply the initial collection of those fees." *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 876 n.4 (1998) (original emphasis).

Furthermore, the panel's novel conclusion disregards the government's duty to refrain from unconstitutional conduct, and its culpability for its unconstitutional seizure of "agency fees" from nonunion public employees for a union's benefit. *See also Foster*, 268 F.3d at 694. This Court unambiguously declared in *Hudson* that "the **government** and union have a responsibility to provide procedures that minimize th[e] impingement [on First Amendment rights] and that facilitate a nonunion employee's ability to protect his rights" when they enforce a forced-unionism provision, 475 U.S. at 307 n.20 (emphasis added). Yet, another Ninth Circuit panel—relied upon by the panel below, App. A at 4a—discarded that conclusive affirm-ance of **government** responsibility in favor of a construction of § 1983 embracing the proposition that "the routine deduction of fees by the [government] employer," does not injure employees when the necessary procedures have not been provided. *Foster*, 268 F.3d at 694.

Thus, the panel followed *Foster*'s decision elevating state statutory policy ostensibly favoring seizure of agency fees, *id.*, over the federal constitutional policy barring fee seizures absent compliance with "the constitutional requirements for the . . . collection of agency fees," *Hudson*, 475 U.S. at 310.

Distribution of an inadequate *Hudson* notice does not cause the injury necessary to establish standing. App. A at 4a, 298 F.3d at 846. Rather, nonmembers are injured by the seizure of agency fees, an act committed solely by the public employer. The panel's failure to acknowledge this point (the core of the employees' argument, *see* Plaintiffs-Appellants' Reply Brief, filed 1 December 2001, pages 4-22), underlies its standing ruling: "The challenged indemnification clause upon which the employer insisted caused neither the union to furnish, nor the plaintiffs to receive, inadequate notice." App. A at 4a, 298 F.3d at 846. What the panel did not face was the fact that the indemnification clause caused the County to agree to, and enforce, the forced-unionism agreement, *i.e.*, to seize agency fees from the employees' wages.

Having miscast the "injury" suffered by the employees from whom forced union dues are seized, the panel consequently ignores the palpable and direct effect of the indemnification agreement in the seizure of agency fees. Moreover, the panel ignores the real and imminent prospect of **additional** financial injury (beyond the County's past illegal seizures of agency fees), insofar as the employees remain subject to the County/EDCEA forced-unionism agreement.[2] Indeed, given the renewal of

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[2] Petitioner Karen Pierce left her bargaining unit employment during the pendency of this lawsuit, R. 68, Exhibit A, ¶ 5, and therefore does not face the prospect of compelled subsidization of EDCEA's indemnification expenditures. However, because the other employees possess standing on

(continued...)

agency fee seizures after the District Court's order of January 1998, App. G, they already have suffered that injury, when EDCEA charged them for the costs of indemnifying the County for its defense against their own meritorious lawsuit.

A union may not charge objecting nonmembers for "expenses incident to [an illegal] strike," because this Court "can imagine no legitimate governmental interest that would be served by compelling objecting employees to subsidize activity that the State has chosen to disallow." *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 531 (1991); *accord id.* at 562 (opinion of Scalia, J.). Similarly, no legitimate governmental interest can be served by compelling objecting employees to subsidize a public employer's costs of defending itself against those employees' successfully-adjudicated claims that it violated their First and Fourteenth Amendment rights by seizing agency fees in the absence of *Hudson* compliance.

This Court has consistently recognized the First Amendment repercussions of forced-unionism schemes. *Hudson*, 475 U.S. at 301 (quoting *Abood*, 431 U.S. at 222); *see also Abood*, 431 U.S. at 255 (Powell, J., concurring in the judgment); *Lehnert*, 500 U.S. at 517-19; *see also Ellis v. Railway Clerks*, 466 U.S. 435, 447, 455-56 (1984) ("by allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights"; "[t]he First Amendment does limit the uses to which the union can put funds obtained from dissenting employees"). The coerced subsidization imposed by indemnification provisions in cases such as this serves no legitimate governmental interest, but seriously "impact[s]" the

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[2] (...continued)
this basis, this Court need not consider Pierce's status. *Clinton*, 524 U.S. at 431 n.19 (citing *Bowsher v. Synar*, 478 U.S. 714, 721 (1986)).

employees' First Amendment rights. *Hudson*, 475 U.S. at 301; *cf.* 42 U.S.C. § 1988 (fee-shifting provisions).

When it adopted the "injury-because-*Hudson*-was-not-followed" reasoning (App. A. at 2a-4a, 298 F.3d at 845-46), the panel below—like its predecessor panel, App. E—ignored the employees' real economic injury in EDCEA's indemnification of the County and Libicki from the costs of their defense of this lawsuit. The County/EDCEA MOU thus adds to the injury of the County's unlawful seizure of agency fees the insult of requiring the employees to subsidize the County's financial liability for that injury. Certainly, that injury is sufficient to confer upon the employees standing to challenge the legality of the indemnification agreement. *Lyons*, 461 U.S. at 111.

2. The Conflict Among the Circuits.

The Ninth Circuit's decision also conflicts with decisions of four other Circuits that have held employers liable for seizing agency fees absent compliance with *Hudson*'s requirements.[3] There is no other precedent consistent with this panel's decision.

A public employer's duty to refrain from inflicting constitutional harm by seizing fees is unanimously recognized in the Third, Sixth, Seventh, and Tenth Circuits, the only other Circuits to consider the question. *Wessel v. City of Albuquerque*, 299 F.3d 1186, 1197-99 (10th Cir. 2002) ("That a public employer has certain obligations within the fair share deduction framework established by courts is beyond dispute"), *reh'g denied* (1 Oct. 2002); *Hohe v. Casey*, 956 F.2d 399, 405-06, 411 (3d Cir. 1992) ("the employer and the union must have

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[3] There is good cause to believe that it defies existing **Ninth** Circuit precedent, since this rule was previously recognized in *Knight*, 131 F.3d at 817, based upon *Hudson*, 475 U.S. at 307 n.20.

a constitutional procedure in place before deducting fees"); *Tierney v. City of Toledo*, 824 F.2d 1497, 1504, 1507 (6th Cir. 1987) ("no union or employer may take any action to enforce a non-union member's duty to pay any dues, whether through a deduction from wages or payment from wages already paid," absent *Hudson* compliance); *Weaver v. University of Cincinnati*, 970 F.2d 1523, 1538 (6th Cir. 1992) ("a public employer ha[s] duties separate and apart from those of the union"); *Hudson v. Teachers Local No. 1*, 743 F.2d 1187, 1191 (7th Cir. 1984) (public agency liable), *aff'd*, 475 U.S. 292 (1986); *see also Andrews v. Education Ass'n of Cheshire*, 829 F.2d 335, 339 (2d Cir. 1987) (*Hudson* "mandated that the unions and government use a narrowly drawn plan that protects the nonmembers' first amendment interests").

The panel's mischaracterization of the employees' argument—that they argued that "the indemnification clause is the legal cause of the inadequate *Hudson* notice," App. A at 4a; 298 F.3d at 846; *but see supra* page 8—is contrary to both the Record and the uniform rule of law recognized by this Court and the other Circuits.

This Court should grant *certiorari* to address the panel's deviation from this Court's forced-unionism jurisprudence, and that of the other Circuits, as to the injury-in-fact suffered by nonunion employees subject to forced-unionism schemes.

B. The Conflict with "Standing" Decisions.

1. The Conflict with This Court's Decisions.

Insofar as the employees seek prospective declaratory and injunctive relief that Respondents' indemnification scheme is void as against public policy, the panel failed to analyze properly the employees' standing under *Lyons*. *Lyons* holds that litigants seeking such relief demonstrate standing when they

show a "real or immediate threat that [they] will be wronged again—a 'likelihood of substantial and immediate irreparable injury.'" 461 U.S. at 111 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 502 (1974)). The four employees who remain employed by the County, subject to successor County/EDCEA MOUs and their forced-unionism provisions, satisfy these requirements. Nevertheless, because "[t]he remedy the plaintiffs seek, invalidation of the indemnification clause, does not compensate plaintiffs for past violations of *Hudson,* nor does it prevent future violations," the panel below declared that the employees failed to meet "the redressability requirement for standing." App. A at 4a, 299 F.3d at 846.

In *Stamford Board of Education v. Stamford Education Association*, 697 F.2d 70, 74 (2d Cir. 1982), a similar indemnification provision was struck down. The Second Circuit cited the union's payment of the public employer's damages for entering into an unlawful agreement and the derivation of that payment from, "at least in part, funds collected as dues from the plaintiffs themselves or from members of the plaintiff class." *Id.* (citing *Patterson v. American Tobacco Co.*, 535 F.2d 257, 269 (4th Cir. 1976) (union may not bargain away minority employees' right to equal treatment)). Similarly, the employees here face the very real prospect of subsidizing the opposition to their own lawsuit, when EDCEA indemnifies Respondents County and Libicki, and charges bargaining unit employees for those costs.

That the employees will be forced to subsidize the County's defense exceeds the showing of "contingent liability" sufficient to confer standing upon the City of New York in *Clinton v. City of New York*, 524 U.S. 417, 429-30 (1998). Opposing a constitutional challenge to the Line Item Veto Act, 2 U.S.C. § 691, *et seq.*, the United States government argued that there

was no "actual injury [to the City] because the claims are too speculative," 524 U.S. at 430, citing the fact that its liabilities were dependent upon the action of the State of New York. Rejecting this argument, this Court compared the President's exercise of his authority under the Act to an appellate court's setting aside of a defense verdict, with remand for a new trial of a multibillion dollar damage claim. As the Court noted, "[e]ven if the outcome of the second trial is speculative, the reversal, like the President's cancellation, causes a significant immediate injury by depriving the defendant of the benefit of a favorable final judgment." *Id.*

Similarly, the courts below were confronted with the self-evident fact that indemnification lowers employer costs for violating nonmember employee rights, thereby creating disincentives to the public employer's protection of the employees' constitutional rights. Moreover, it is uncontroverted that the County, doing nothing to ensure that *Hudson* was satisfied, seized agency fees **notwithstanding** its doubts about the constitutional adequacy of EDCEA's financial disclosure. If "denial of a benefit in the bargaining process can itself create an Article III injury, irrespective of the end result," *Clinton*, 524 U.S. at 433 n.22 (citing *Northeastern Florida Chapter of the Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. 656, 666 (1993)), then certainly achievement of a term in the bargaining process can likewise inflict an Article III injury.[4]

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[4] The employees need not demonstrate that the County would have eschewed fee seizures absent the indemnification provision, *see* App. E at 42a-43a, 177 F.3d at 1112, to establish their standing. This Court has repeatedly refused to impose such a requirement. *Jacksonville*, 508 U.S. at 664-65 (citing *Turner v. Fouche*, 396 U.S. 346, 361 (1970) (non-property owning plaintiff need not show that he would have been appointed to school

(continued...)

2. The Conflict Among the Circuits on Standing.

In addition to the Ninth Circuit in this case, three other courts of appeals—the Tenth, Sixth, and Third, respectively—have faced the indemnification issue in the context of forced-unionism agreements. *See Wessel*, 299 F.3d at 1197-99; *Weaver*, 970 F.2d at 1536-38; *Hohe*, 956 F.2d at 411-12. Indeed, an earlier panel of the Ninth Circuit faced a similar challenge. *Knight*, 131 F.3d at 817 (addressing merits challenge to indemnification provisions brought by similarly-situated employees).[5] None has eluded the merits by adopting the position of the panel in this case.

Most recently, in *Wessel*, the Tenth Circuit specifically criticized and rejected the Ninth Circuit's approach. There, the

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[4] (...continued)
board but for requirement that members be property owners—only that he would have been considered for the position)); *Clements v. Fashing*, 457 U.S. 957 (1982) (rejecting claim that dispute was "merely hypothetical" because litigants could not show they actually would have been elected but for "automatic resignation" provisions of Texas state constitution); *Regents of University of California v. Bakke*, 438 U.S. 265, 281 n.14 (1978) (requisite injury shown by refusal of state to allow litigant to compete for benefit sought).

[5] Other than a perfunctory citation which fails to support the proposition for which it is cited, the panel disregarded this circuit authority. App. A at 4a, 298 F.3d at 846. In *Knight*, the district court "quickly disposed of" the argument that employees "are not a proper party to sue on a contract of indemnity." Petition for a Writ of *Certiorari*, *Anchorage Educ. Ass'n v. Patterson*, No. 97-1454, App. C at 47a. However, perhaps recognizing *Knight*'s conclusion on the standing issue, the panel renders *Knight* through the prism of *Foster*, which declared that the seizure of fees is not an "adverse action" under *Knight*, 131 F.3d at 817. *Foster*, 268 F.3d at 694.

court referred to the Ninth Circuit's erroneous identification of the injury, noting that:

> [t]he alleged injury results from the indemnification provision's negation of any incentive for the City to ensure that the *Hudson* requirements were followed. The nonmembers' entire argument presumes that, if the City faced potential liability, it would have prevented the fair share fees from being deducted unconstitutionally from the nonmembers' paychecks.

299 F.3d at 1199 n.3.

The Third Circuit addressed the challenge of similarly-situated employees to an indemnification agreement in *Hohe*, 956 F.2d at 411-12. There, the district court rejected the employees' challenge to the indemnification provision, simultaneously rejecting a challenge to a statute requiring the public employer (the Commonwealth of Pennsylvania) to withhold agency fees "even if the necessary procedural safeguards have not been implemented." *Hohe v. Casey*, 740 F. Supp. 1092, 1098 (M.D. Pa. 1989), *rev'd in pertinent part*, 956 F.2d 399, 412 (3d Cir. 1992). The district court held that even if the union's procedure were held to be constitutionally defective, "[t]he fact that the Commonwealth might not have earlier barred fee collection would not make the plaintiffs more victorious," and that "under the facts of this case it is unnecessary to consider the plaintiffs' challenge to [the statute]." 740 F. Supp. at 1099. In a footnote, the district court went on to state that, "[f]or the same reasons we also reach that conclusion with respect to the indemnification clause in the collective bargaining agreement." *Id.* at n.5.

On appeal, the nonmembers argued that the indemnification clause "is void as against public policy." 956 F.2d at 411. The

Third Circuit explicitly held that employees subject to a monopoly bargaining agreement possess standing to challenge its terms: "We find ourselves in disagreement with the ruling of the district court that it need not decide this issue. We say so because we think the theory advanced by the plaintiffs' attack on the clause raises a cognizable legal issue." *Id.* at 411.

Later, the Sixth Circuit declared such clauses void as against public policy. *Weaver*, 970 F.2d at 1536-38.[6] That decision is devoid of any suggestion that employees lack standing to challenge indemnification provisions. The court found it sufficient that the clause "protect[s] the University from any financial consequences of going along with procedures selected by the union that fail to comply with the constitutional standards enunciated in *Hudson*." *Id.* at 1538 (other citations omitted).

Any federal court's merits judgment presupposes determination that the parties possess the requisite standing. *National Org. for Women v. Scheidler*, 510 U.S. 249, 255 (1994) (standing is open to review at all stages of the litigation); *cf. Brewer v. Lewis*, 989 F.2d 1021, 1025 (9th Cir. 1993) (standing is a jurisdictional question that must be addressed at the threshold of any case). It is "an indispensable part of the plaintiff's case." *Lujan*, 504 U.S. at 561. Indeed, when the party before the court lacks standing, there is no case or controversy, and the court lacks jurisdiction. As this Court recently has reaffirmed, "'Jurisdiction is the power to declare

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[6] The Sixth Circuit earlier issued an unpublished decision declaring such clauses void as against public policy. *Cramer v. Matish*, 924 F.2d 1057 (table), 1990 WL 169640 (6th Cir. 1990). There, no question was raised that employees possess standing to challenge one of their terms and conditions of employment.

the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'" *Steel Co.*, 523 U.S. at 94 (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1868)); *see also National Law Center on Homelessness & Poverty v. Kantor*, 91 F.3d 178, 180 (D.C. Cir. 1996). Thus, implicit in the Sixth Circuit's merits determination is the conclusion that it possessed jurisdiction to decide the issue presented to it.

This Court should grant *certiorari* to settle the conflict among the circuits as to whether employees subject to a forced-unionism provision agreement possess standing to challenge the legality of an indemnification clause in that agreement.

II. THERE IS WIDESPREAD CONFLICT AMONG THE CIRCUITS AS TO WHETHER UNIONS MAY INDEMNIFY STATE AND LOCAL GOVERNMENTS FOR THEIR CONSTITUTIONAL TORTS WHEN ILLEGALLY ENFORCING FORCED-UNIONISM AGREEMENTS.

A. The Conflict.

Like this case, *Hudson* was brought pursuant to § 1983. 475 U.S. at 298 n.3. There, this Court addressed "whether the [agency shop] procedure used by [a union] and approved by [a public employer] adequately protects the basic distinction drawn in *Abood*," between "devis[ing] a way of preventing compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities." 475 U.S. at 302 (quoting *Abood*, 431 U.S. at 237). "[A]nalyz[ing] the problem from the perspective of the First Amendment concerns," 475 U.S. at 304 n.13, the Court determined that there are three "constitutional requirements for

the . . . collection of agency fees." *Id.* at 310. The Court specifically stated that, in this context, both "the government and union have a responsibility to provide procedures that minimize that impingement [on First Amendment rights] and that facilitate a nonunion employee's ability to protect his rights." *Id.* at 307 n.20 (citing *Ellis*, 466 U.S. at 455).

Under this articulation of government responsibility, a public employer may not, without running afoul of constitutional norms, seize agency fees from nonmember employees on behalf of a union absent strict adherence to these "constitutional requirements." *Hudson*, 475 U.S. at 310. If it does so, it injures the nonmembers. Nevertheless, the Ninth Circuit has rejected this Court's decisionmaking in three cases that write government liability out of § 1983 law. App. A at 2a-4a, 298 F.3d at 846; *Foster*, 268 F.3d at 694; *Harik*, 298 F.3d at 870.

Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, created a remedy "against those who representing a State in some capacity were *unable* or *unwilling* to enforce a state law," *Monroe v. Pape*, 365 U.S. 167, 176 (1961) (original emphasis); *see also District of Columbia v. Carter*, 409 U.S. 418, 426 (1973). Its purpose is to "protect the people from unconstitutional action under color of state law 'whether that action be executive, legislative, or judicial.'" *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (quoting *Ex parte Virginia*, 100 U.S. 339, 346 (1879)). The catalyst for this statutory enactment was widespread violence against blacks and their supporters by the Ku Klux Klan. *Wilson v. Garcia*, 471 U.S. 261, 276 (1985); *see also* 1A Martin A. Schwartz & John E. Kirklin, *Section 1983 Litigation: Claims and Defenses* § 1.3 (3d ed. 1997). Its passage was rooted in grave distrust of state and local officials to enforce federal constitutional rights against—and perhaps in league

with—powerful local interests committed to violation of the federal constitutional rights possessed by individuals.

Thus, State and local governments bear non-delegable responsibility for their "constitutional torts." 42 U.S.C. §§ 1983, 1988. The purpose of § 1983 is "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992) (citing *Carey v. Piphus*, 435 U.S. 247, 254-57 (1978)); *see also City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 268 (1981) (deterrence of future abuses of power is an important purpose of this section). Similar purpose can be inferred from the fee-shifting provisions of § 1988.

Surprisingly, the courts of appeals are in deep conflict over whether labor unions may agree to indemnify public employers against any liability arising out of the unlawful enforcement of compulsory-unionism provisions. The Ninth Circuit has twice eluded this issue, but four other courts of appeals have faced it, three in this specific context.

Shortly after the decision in this case, the Tenth Circuit declared such agreements void as against public policy. *Wessel*, 299 F.3d at 1197-99 (2-1 decision). Another Circuit, the Sixth, agrees. *Weaver*, 970 F.2d at 1536-38 (holding that "[a] clause that relieves the employer of all consequences for its failure to assume and conscientiously carry out its duties, including even the cost of defending legal actions, is against public policy"). A third Circuit, the Second, agrees with the Sixth in a related context. *Stamford*, 697 F.2d at 73-75. Only the Third Circuit has found such agreements permissible and enforceable. *Hohe*, 956 F.2d at 411-12.

When the Third Circuit first addressed this controversial issue, the Sixth Circuit already had addressed it in its

unpublished *Cramer* opinion. Citing *Stamford*, *Cramer* reversed a district court judgment and remanded the case, directing the lower court to "strike [this] . . . void provision[] from the policy." *Cramer*, 1990 WL 169640 at *4. The provision was void as against public policy because, "[u]nder *Hudson*, the public employer, not the union, has the primary duty to ensure that the plan is constitutionally valid." "[C]lauses in collective bargaining agreements which purport to relieve public employers from liability for violations of federal constitutional and civil rights are void as against public policy." *Id.* (citing *Stamford*, 697 F.2d at 73-75). *Cramer* concluded that "[w]ith-out such a role, public employe[r]s would have **no incentive** to fulfill their constitutional duties." 1990 WL 169640 at *4 (emphasis added). *Cramer* thus held that a union's indemnification of a public employer in this context is void as against public policy.

The Third Circuit declined to follow *Cramer*. *Hohe*, 956 F.2d at 411 (citing *Cramer* (other citation omitted)). Noting the immunity from damages enjoyed by the Commonwealth and its officers sued in their official capacity, the court rejected the argument that indemnification encourages public employers to violate employees' constitutional rights by allowing escape from liability for costs and attorneys' fees pursuant to § 1988. The court reasoned that "the clause [does not] explicitly provide that [the union] will indemnify the Commonwealth for the costs or fees involved in defending any claim based upon its deduction of fair share fees." 956 F.2d at 411-12.[7] Even if it did, because the union has a significant incentive "to ensure that its

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[7] This distinguishes *Hohe* from the present case, where the indemnification clause specifies that indemnification includes the "reasonable cost of County's attorney fees and costs." App. A at 3a, 298 F.3d at 845.

procedures comply with the Constitution," *i.e.*, that "[f]ailure to do so may result in its being unable to retain a portion of the fair share fee," the Third Circuit held that "invalidation of the indemnification clause is not required by the First Amendment." *Id.* at 412.

Shortly after *Hohe*, the Sixth Circuit decided *Weaver*, adopting virtually every argument rejected by the Third Circuit. The Sixth Circuit, carefully analyzing *Stamford* as well as *Hohe*, concluded that the former was more persuasive than the latter. The Sixth Circuit declared that "the indemnification agreement in the present case was repugnant to public policy, and therefore, invalid," for two reasons. First, the clause "protect[s] the university from any financial consequences of going along with procedures selected by the union that fail to comply with the constitutional standards enunciated in *Hudson*." Second, the court recognized that "the university as a public employer had duties separate and apart from those of the union." *Weaver*, 970 F.2d at 1538 (citations omitted). The Sixth Circuit concluded that a "clause that relieves the employer of all consequences for its failure to assume and conscientiously carry out its duties, including even the cost of defending legal actions, is against public policy." *Id.*

Most recently, the Tenth Circuit in *Wessel* addressed the indemnification issue, agreeing with the Sixth Circuit. *Wessel* rejected the district court's argument that a public employer can "do little, if anything, to detect and prevent,"[8] *Hudson* violations. 299 F.3d at 1197. The Tenth Circuit conscientiously applied this Court's *Hudson* mandate. It concluded that "if the

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[8] That argument clearly is inapplicable here, where the County determined before seizing fees that the union's financial disclosure was probably inadequate under *Hudson*.

Supreme Court had only been concerned with the union's ability to carry out the *Hudson* requirements, it would not have placed the burden on both parties." *Wessel*, 299 F.3d at 1198 (citing 475 U.S. at 307 n.20).

B. The Importance of the Issue.

This question manifestly is important, both in practice and principle, as this Court previously recognized by granting *certiorari* in cases such as *Ellis* and *Hudson*, and when it granted *certiorari* and vacated and remanded the prior panel's opinion.

It is important in practice because the Court's resolution of this question will affect employees subject to large numbers of such agreements. Public-sector compulsory unionism agreements are lawful in at least twenty (20) states and the District of Columbia. Milton L. Chappell, *Seeking a New Foundation: Legislative and Practical Alternatives to the Current Monopoly Bargaining Model That Will Enhance the Viability of Independent Teacher Groups*, 16 Gov't Union Rev. 1, 23-28 (table) (Summer 1995). As the cases above illustrate, public employee unions frequently assume the employer's liability in order to obtain and enforce forced-unionism agreements. Indeed, California has recently amended the MMBA to require that public employees indemnify local public employers in the absence of a negotiated agreement. Cal. Gov't Code § 3502.5(b). There can be little doubt that the purpose is to ensure that public employers seize fees even when they have good cause to believe that a union has failed to comply with *Hudson*'s requirements.

Whether public employers may be indemnified by labor unions from "any and all claims, demands, suits, orders, judgements or other forms of liability that shall arise out of or

by reason of, action taken or not taken" pursuant "to the collection and procedures for collection of fair share fees," App. A at 3a, 298 F.3d at 845, is important in principle, too. A requirement that public employees financially support their monopoly bargaining representative implicates fundamental constitutional rights. Because the impairment of the First Amendment rights of public employees is implicit in any forced-unionism agreement, *Hudson*, 475 U.S. at 301 n.3; *see also Ellis*, 466 U.S. at 455, "the government and union have a responsibility to provide procedures that minimize that impingement and that facilitate a nonunion employee's ability to protect his rights." 475 U.S. at 307 n.20. Questions as to how that responsibility is to be enforced against State and local complicity in the efforts of discrete, locally-powerful groups to violate the constitutional rights of another discrete, less-politically powerful group, *see Wilson v. Garcia*, 471 U.S. at 276, necessarily are important. Indeed, they are at the core of the fundamental congressional policy embodied in § 1983, which is to create a remedy "against those who representing a State in some capacity [a]re *unable* or *unwilling* to enforce a state law." *Monroe v. Pape*, 365 U.S. at 175-76.

This Court's intervention is necessary to establish conclusively nationwide that public employers, surrendering their employees' unfettered right to choose whether to support their monopoly bargaining representative, cannot avoid their "responsibility to provide procedures that facilitate a nonunion employee's ability to protect his rights." *Hudson*, 475 U.S. at 307 n.20. Further, it is necessary to guarantee that public employers cannot, without economic consequence and in league with a labor union, "subject, or cause[] to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws," 42 U.S.C. § 1983.

CONCLUSION

For the reasons stated above, this petition for a writ of *certiorari* should be granted, and the case set for plenary briefing and argument on the important questions presented herein.

Respectfully submitted,

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October 2002

APPENDICES

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

1 August 2002

[298 F.3d 844]
United States Court of Appeals,
Ninth Circuit.

Steven PRESCOTT; Robert F. Berry; Cheryl L. Jones; Karen Pierce; Christine M. Turney, Plaintiffs-Appellants,
v.
COUNTY OF EL DORADO; Kathy Libicki; Local 1 El Dorado County Employees Association, Defendants-Appellees.

No. 01-15913.

Argued and Submitted April 9, 2002.
Filed Aug. 1, 2002.

[845]Before SCHROEDER, Chief Judge, B. FLETCHER and KOZINSKI, Circuit Judges.

OPINION

SCHROEDER, Chief Judge.

This case was before us previously, when we held, inter alia, that the plaintiffs lacked standing to challenge an indemnification provision in a collective bargaining agreement. *Prescott v. County of El Dorado,* 177 F.3d 1102, 1112 (9th Cir.1999) (*Prescott I*). That provision requires the union to hold the employer harmless from any liability arising out of the collection of agency fees from non-union members of the bargaining unit. *Id.* Plaintiffs are non-union members of an

agency shop bargaining unit employed by defendant El Dorado County, California.

The Supreme Court vacated our decision and remanded for reconsideration of the standing issue in light of its decision in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). *Prescott v. County of El Dorado*, 528 U.S. 1111, 120 S.Ct. 929, 145 L.Ed.2d 807 (2000). We remanded in turn to the district court. *Prescott v. County of El Dorado*, 204 F.3d 984-85 (9th Cir.2000) (*Prescott II*) (reinstating the original opinion except as to standing and remanding to the district court).

We now review the district court's decision, on remand, that the plaintiffs lack standing to challenge the indemnification clause. We affirm, because there is no causal relationship between the indemnification agreement and the injury plaintiffs have suffered. The indemnification clause requires the union to defend and indemnify the employer against all claims arising out of the employer's collection of agency fees. The only cognizable injury the plaintiffs allege is that the union did not give them adequate notice of the basis of the fees. *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 310, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986).

The facts and the background of the litigation are more fully explained in our earlier opinion. *Prescott I*, 177 F.3d at 1104-05. Plaintiffs sued in federal court alleging that the process by which the agency fees were deducted from their paychecks violated the standards enunciated by the Supreme Court in *Hudson*. They also challenged the validity, on public policy

grounds, of the indemnification clause. *Id.* Only the plaintiffs' challenge to the indemnification clause remains at issue in this appeal. The indemnification clause provides:

> Local 1 shall defend, indemnify and hold harmless, release and save the County and its agents and employees against any and all claims, demands, suits, orders, judgements or other forms of liability that shall arise out of or by reason of, action taken or not taken by the County under this Agreement. This includes but is not limited to the collection and procedures for collection of fair share fees and reasonable cost of County's attorney fees and costs along with reasonable cost of management preparations [sic] time as well.

Plaintiffs asked the district court to hold that the clause is contrary to public policy and therefore unenforceable. Plaintiffs **[846]**did not show, however, that the clause itself has caused them any injury. The only injury they alleged was that the union failed to comply with the requirements of *Hudson* to provide notice of the basis of agency fees that plaintiffs must pay as members of an agency shop and to maintain an adequate portion of collected fees in escrow pending fee arbitration. *See Prescott I,* 177 F.3d at 1104-05.

In order to have standing, a plaintiff must establish an injury in fact, causation, and redressability. *Laidlaw,* 528 U.S. at 180-81, 120 S.Ct. 693. Plaintiffs maintain that there is a causal relationship between the *Hudson* injury and the indemnification clause. They contend that because the *Hudson* notice requirement is triggered by the collective bargaining agreement, and because the employer has stipulated that it would not have

entered into the collective bargaining agreement unless it contained the indemnification clause, the indemnification clause is the legal cause of the inadequate *Hudson* notice.

The district court correctly ruled, however, that this causal relationship is too remote. The injury must be "fairly traceable to the challenged action of the defendant." *Laidlaw,* 528 U.S. at 180, 120 S.Ct. 693. It cannot be the result of the "independent action of some third party not before the court." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (quoting *Simon v. E. Ky. Welfare Rights Org.,* 426 U.S. 26, 41-42, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976).) Plaintiffs' injury was not caused by the employer's entry into the collective bargaining agreement; it was caused by the union's inadequate notice of expenditures on which the agency fees were based. Indeed, in this circuit, the employer has no responsibility for ensuring the adequacy of the notice; that is the union's responsibility. *Foster v. Mahdesian,* 268 F.3d 689, 694 (9th Cir.2001); *Knight v. Kenai Peninsula Borough Sch. Dist.,* 131 F.3d 807, 817 (9th Cir.1997). The challenged indemnification clause upon which the employer insisted caused neither the union to furnish, nor the plaintiffs to receive, inadequate notice.

In addition, and as a corollary, the district court also correctly held that the plaintiffs have not met the redressability requirement for standing. Redressability requires that it be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Laidlaw,* 528 U.S. at 181, 120 S.Ct. 693. The remedy the plaintiffs seek, invalidation of the indemnification clause, does not compensate plaintiffs for past violations of *Hudson,* nor does it prevent future violations.

Cf. Laidlaw, 528 U.S. at 185-86, 120 S.Ct. 693("a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress").

Plaintiffs also contend that the district court failed to comply with our mandate to require the union to retain a larger percentage of agency fees in escrow. *See Prescott I,* 177 F.3d at 1111. After our prior remand, the district court entered an order requiring ten percent of collected fees to be held in escrow. This complied with our directive. The plaintiffs nevertheless complain that the order was not expressly embodied in the district court's order resolving the standing issue, its final order in the case. That order, however, explains that the court had already ordered the escrow, and that its order remained in full effect. The final judgment entered thus encompassed all the interlocutory rulings of the court, including the escrow order. *See, e.g., City of Los Angeles v. Santa Monica Baykeeper,* 254 F.3d 882, 889 n. 1 (9th Cir.2001) (interlocutory orders merge into the final judgment and **[847]**may be challenged in appeal from that judgment).

AFFIRMED.

APPENDIX B

FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

17 April 2001

[Clerk's stamp omitted in printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

STEVEN H. PRESCOTT, et al.

v.

CASE NUMBER:
CIV S-95-1859 LKK JFM

COUNTY OF EL DORADO, et al.

XX – **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN FAVOR OF DEFENDANTS AND AGAINST PLAINTIFFS IN ACCORDANCE WITH THE COURT'S ORDER OF APRIL 17, 2001.

Jack L. Wagner
Clerk of the Court

ENTERED: April 17, 2001

by: /s/
A. Sourvannarath, Deputy Clerk

APPENDIX C

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

17 April 2001

[Clerk's stamp omitted in printing]
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

STEVEN H. PRESCOTT, et al.,
Plaintiffs,

NO. CIV. S-95-1859
LKK/JFM

v.

ORDER

COUNTY OF EL DORADO, et al.,
Defendants.

_____/

The plaintiffs, non-union employees of El Dorado County (the "County"), sued the El Dorado County Employees Association ("EDCEA" or the "Union"), as a local affiliate of the Professional Employees Union, Local #1 ("PEU"), for failing to provide them proper notice and procedural requirements with the collection of its agency fee in violation of the First, Fifth and Fourteenth Amendments to the United States Constitution. This matter comes before the court on cross-motions for summary judgment. I resolve the matter based on the papers and pleadings filed herein and after oral argument.

PROCEDURAL HISTORY

On February 26, 1996, the court preliminarily enjoined the Union from collecting a fair share agency fee until it provided a challenge procedure which allowed for the dispute to be resolved within 120 days from the date on which the fee was seized from the nonmembers' paychecks. See Prescott v. County

of El Dorado, 915 F. Supp. (E.D. Cal. 1996). The court also ordered the Union not to impose upon nonmembers the "under penalty of perjury" and specificity requirements for challenging the fee. Id. The court, however, denied the balance of plaintiffs' motion. First, the court found that the notice provided an adequate basis for the fee because it identified PEU's major expense categories and provided nonmembers with sufficient information to ascertain which of those categories the Union deemed chargeable to nonmembers. The court reasoned that under Chicago Teachers Union, Local No. 1, AFL-CIO v. Hudson ("Hudson"), 475 U.S. 292, 306 n. 18 (1986), the Union is only required to provide the nonmember with sufficient information to decide whether to challenge the legitimacy of the Union's fee, and did not require that the Union justify its expense in detail prior to the challenge. Employing the "local union presumption," the court also held that PEU need not provide a breakdown of the expenditures for each local affiliate because local affiliates generally spend less money on political activity than state or national unions.

Recognizing the very limited record describing the difference between various types of financial reviews, the court also determined that, while adequate notice under Hudson must include "verification by an independent auditor," an accountant's "review" appeared to provide the verification required by the Supreme Court. The court noted, however, that the lack of a full record deprived it of an opportunity to definitively resolve the issue. See Prescott, 915 F. Supp. At 1089, n. 13. Finally, the court held that plaintiffs did not demonstrate a likelihood for success on their challenge to the 4% escrow figure because plaintiffs did not show that more than 4% was reasonably in dispute.

The parties then cross-moved for summary judgment. Plaintiffs continued to maintain that the notice and procedures violated the First, Fifth and Fourteenth Amendments because they (1) did not contain audited financial disclosures of the expenditures of EDCEA and affiliated labor organizations receiving money from EDCEA, (2) utilized an unconstitutional standard of chargeability, and (3) contained unduly burdensome procedures for challenging the fee. Plaintiffs sought a declaratory judgment stating that the defendants have violated the constitutional requirements for collecting an agency fee, a permanent injunction against all fee "seizures" from the nonmembers, and restitution of all fees already "seized" from nonmembers. Finally, plaintiffs requested a declaratory judgment that the indemnification agreement between the County and EDCEA was void as against public policy.

Defendants argued that the court should grant them summary judgment primarily for the reasons discussed in the court's preliminary injunction order. With regard to the "verification by an independent auditor" required by Hudson, defendants argued that an accountant's review sufficed because it provided nonmembers with the information pertinent in assessing the validity of the fee, and that an audit would burden the Union with an unnecessary cost. Defendants also moved to dissolve the preliminary injunction on the basis that the Union has instituted a procedure which permits a nonmember to have a hearing within sixty days from making a challenge to the fee, and to obtain a final decision within thirty days from the hearing.

In consideration of the motions for summary judgement, the court held that defendants' "accounting review" satisfied the

constitutional requirements set forth in Hudson. See Order filed January 26, 1998 at 12. The court also reaffirmed its holding that a 4% escrow amount was sufficient, see id. at 13, and held that the local union presumption was valid under Hudson. See id. at 16. The court then made permanent the preliminary injunction issued on February 26, 1996. See id. at 17. Finally, the court dismissed plaintiffs' challenge to the indemnity clause between the Union and the district because the plaintiffs had failed to demonstrate standing to pursue such a claim. See id. at 19.

On appeal, the Ninth Circuit reversed in part and affirmed in part this court's order. In relevant part, the court affirmed this court's holding that the plaintiffs lacked standing to challenge the indemnity agreement. See Prescott v. El Dorado, 177 F.3d 1102, 1111-1112 (9th Cir. 1999) ("Prescott II"). The court noted that plaintiffs could not show any connection between the indemnity agreement and their injury and that they could not demonstrate that a favorable decision would ameliorate their injury or prevent future recurrence of the violation. See id. at 1112. The Supreme Court granted certiorari, vacated the Ninth Circuit's judgment and remanded the case for further consideration in light of Friends of the Earth v. Laidlaw, 528 U.S. 167 (2000). The remaining issue in this lawsuit is the plaintiffs' challenge to the indemnity agreement.[1]

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[1] The court disposed of the other issues remanded by the Circuit in Prescott II. See Order filed November 17, 1999. Specifically, the court held that the Union must hold 10% of the nonmembers' fees in escrow. Defendants complied with the other order issued by the Ninth Circuit when it completed an independent audit of the PEU.

(continued...)

II.
THE FACTS[2]

The "Union Rights" article of the Collective Bargaining Agreement between the County and the EDCEA contains a "hold harmless" section in which the EDCEA indemnifies and holds the County harmless against any suit for actions taken under the "Union Rights" article. In pertinent part, the article provides:

> Local 1 shall defend, indemnify and hold harmless, release and save the County and its agents and employees against any and all claims, demands, suits, orders, judgments or other forms of liability that shall arise out of or by reason of, action taken or not taken by the County under this Agreement. This includes but not limited to the collection and procedure for collection of fair share fees and reasonable cost of County's attorney fees and costs along with reasonable cost of management preparations time as well.

Pursuant to the "Hold Harmless" section, the EDCEA attorneys in this action have entered an appearance on behalf of,

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[1] (...continued)
Contrary to plaintiffs' suggestion, the court need not enter declaratory or injunctive relief for the plaintiffs on those issues.

[2] The facts as stated herein are considered undisputed for the purposes of summary judgment. If a fact objected to by an opposing party is included in this section, then the court has overruled that objection.

and are providing representation to defendants County of El Dorado and Kathy Libicki ("the County Defendants"). The entire compensation paid to counsel for the County Defendants for the representation they are providing in this case has been and is being paid for by the EDCEA. The County Defendants required inclusion of the "Hold Harmless" section as part of the "Union Rights" article of the Memorandum of Understanding. Absent the hold harmless clause, the County Defendants would not have entered into or enforced an agreement including a provision requiring union membership, or in lieu of union membership, payment of an agency fee.

III.
SUMMARY JUDGMENT STANDARDS UNDER FED. R. CIV. P. 56

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56 (c); See also Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Secor Limited v. Cetus Corp., 51 F.3d 848, 853 (9th Cir 1995).

Under summary judgment practice, the moving party

> [A]lways bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrated the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'" Id. Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. See id. at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied." Id. at 323.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); See also First Nat'l Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 288-89 (1968); Secor Limited, 51 F.3d at 853.

In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. Fed. R. Civ. P. 56(e); Matsushita, 475 U.S. at 586 n.11; See also First Nat'l

Bank, 391 U.S. at 289; Rand v. Rowland, 154 F.3d 952, 954 (9th Cir. 1998). The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Owens v. Local No. 169, Assoc. of Western Pulp and Paper Workers, 971 F.2d 347, 355 (9th Cir. 1992) (quoting T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, Anderson, 477 U.S. 248-49; see also Cline v. Industrial Maintenance Engineering & Contracting Co., 200 F.3d 1223, 1228 (9th Cir. 1999).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." First Nat'l Bank, 391 U.S. at 290; See also T.W. Elec. Serv., 809 F.2d at 631. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963 amendments); see also International Union of Bricklayers & Allied Craftsman Local Union No. 20 v. Martin Jaska, Inc., 752 F.2d 1401, 1405 (9th Cir. 1985).

In resolving the summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Rule 56(c); See also In re Citric Acid Litigation, 191 F.3d 1090,

1093 (9th Cir. 1999). The evidence of the opposing party is to be believed, see Anderson, 477 U.S. at 255, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party, see Matsushita, 475 U.S. at 587 (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam)); See also Headwaters Forest Defense v. County of Humboldt, 211 F.3d 1121, 1132 (9th Cir. 2000). Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898, 902 (9th Cir. 1987).

Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 587 (citation omitted).

IV.
STANDING

Plaintiffs seek an order declaring the Union's indemnity agreement with the County void as a matter of public policy. Specifically, they maintain that the indemnity agreement removes incentive for the County to ensure that the Union abides by the requirements of Hudson. Before addressing the merits of their argument, however, I must first determine whether they have standing to challenge the agreement.

Standing requires a showing that plaintiff has "personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." Scott v. Rosenberg, 702 F.2d. 1263, 1267 (9th Cir. 1993). Plaintiff must also demonstrate "that the injury can be fairly traced to the challenged action, [and that it] is likely to be redressed by a favorable decision." Id. (quoting Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 38 (1976)); see also Preferred Communications, Inc. v. City of Los Angeles, 754 F.2d 1396, 1403, (9th Cir. 1985).

Plaintiffs have failed to demonstrate how the remedy they seek will prevent any future violation of their rights under Hudson. Although the plaintiffs may have suffered a violation of the standards enunciated in Hudson, that injury resulted from the Union's conduct, and, notwithstanding the defendants' stipulation, the hold harmless agreement is a cause of the injury only in the most indirect fashion.[3] In this motion, plaintiffs do not seek to make themselves whole for this past violation. Instead, the plaintiffs seek to strike the indemnity agreement in order to prevent the Union from using their dues for political and ideological causes with which they disagree, and which are said to be unrelated to the Union's duty as collective bargaining agent. See Hudson, 475 U.S. at 298. Even if this court ultimately struck the indemnity agreement it would not follow that plaintiffs' injury would be avoided. Rather, whether or not the Union will violate plaintiffs' right under Hudson will turn

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[3] While plaintiffs stipulation makes no sense factually or legally, the court accepts it for the purpose of this motion. Nonetheless, the stipulation does not resolve the issue of whether the order sought will provide relief.

on the Union's conduct independent of the indemnity agreement. Therefore, because plaintiffs cannot connect a favorable judgment in this case with receiving relief from the injury they have failed to demonstrate standing. See, e.g., Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976) (standing denied because it was speculative as to whether the hospitals involved would change their polices to provide for better treatment of the indigent if the plaintiffs successfully invalidated the IRS code which only required the hospitals to provide emergency care for the indigent); Warth v. Seldin, 422 U.S. 490 (1975) (denying standing to challenge zoning regulations because there was no showing that plaintiffs would personally benefit by obtaining housing if the court found the regulation unconstitutional); Linda R.S. v. Richard D., 410 U.S. 614, 618 (1973) ("[Prevailing on the merits] would result in jailing of the child's father. The prospect that prosecution will . . . result in payment of support [which would remedy the alleged injury] can, at best, be termed only speculative.")

The Court's holding in Friends of Earth Inc. v. Laidlaw, does not affect this conclusion. There, the court held that environmental groups had standing to seek relief under the Clean Water Act when they could demonstrate that the alleged violations of a polluter has caused their members to refrain from activity they had previously and would have otherwise undertaken in the affected area. 528 U.S. at 183. Although the injury suffered by the organization members in Friends of Earth Inc. could have been redressed by a favorable decision, as explained above, the same is not true in this case with respect to plaintiffs' challenge to a third-party indemnity agreement.

V.
ORDERS

Accordingly, defendants' motion for summary judgment is GRANTED and the Clerk is directed to CLOSE the case.

IT IS SO ORDERED.

DATED: April 12, 2001.

/s/
LAWRENCE K. KARLTON
Senior Judge
United States District Court

APPENDIX D

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

2 March 2000

[204 F.3d 984]

Steven PRESCOTT; Robert F. Berry; Cheryl L. Jones; Karen Pierce; Christine M. Turney, Plaintiffs-Appellants,

v.

COUNTY OF EL DORADO; Kathy Libicki; Local 1 El Dorado County Employees Association, Defendants-Appellees.

No. 98-15579.

United States Court of Appeals,
Ninth Circuit.

March 2, 2000.

W. James Young, National Right to Work Legal Defense Foundation, Inc., Springfield, Virginia, for the plaintiff--appellant.

Fred J. Hiestand, Sacramento, California, for the defendant-appellee.

On Remand from the United States Supreme Court

Before: FERNANDEZ and McKEOWN, Circuit Judges, and WEINER,[1] District Judge.

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[1] Honorable Charles R. Weiner, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Steven Prescott,[2] an employee of the County of El Dorado, California, appealed the determination of the district court that granted him limited relief on his claim that the assessment of fair-share agency shop fees against him was not fair. We affirmed the district court in part, reversed in part, and remanded. *See Prescott v. County of El Dorado,* 177 F.3d 1102 (9th Cir.1999) (*Prescott I*).

Prescott sought certiorari relief from the United States Supreme Court and it, without further specification, granted certiorari and then vacated and remanded our decision for further consideration[3] in light of its recent holding in *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). *Friends of the Earth* is a standing case, and the only portion of our decision that dealt with standing was part E, which discussed the issue of indemnification. *See Prescott I,* 177 F.3d at 1111-12. In that portion, we affirmed the district court's determination that Prescott lacked standing to object to a contract provision between the El Dorado County Employees Association, Local No. 1 and the County, pursuant to which the former agreed to indemnify the latter "from any liability which arises out of deductions of fees from employee wages, and to provide a defense against any claims." *Id.* at 1111.

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[2] Robert F. Barry, Cheryl L. Jones, Karen Pierce and Christine M. Turney also appeal. What we hold regarding Prescott applies equally to them.

[3] *See Prescott v. El Dorado*, ___ U.S. ___, 120 S. Ct. 929, 145 L. Ed.2d 807 (2000).

Because the district court should address the standing issue in the first instance, we now return the issue to that court for any necessary further development of the facts and for its consideration of *Friends of the Earth* in that respect under the facts of this case.

We reinstate our opinion in *Prescott I,* with the exception of part E. That part shall remain vacated. We also reinstate the concurring opinion. Moreover, we vacate the district court's standing determination, which was discussed in part E, and remand that issue for further consideration.

[985]Therefore, in light of *Prescott I,* as modified, we ORDER that the district court's decision is AFFIRMED in part, REVERSED in part, VACATED in part, and REMANDED.

APPENDIX E

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

12 May 1999

[177 F.3d 1102]

Steven PRESCOTT; Robert F. Berry; Cheryl L. Jones; Karen Pierce; Christine M. Turney, Plaintiffs-Appellants,

v.

COUNTY OF EL DORADO; Kathy Libicki; Local 1 El Dorado County Employees Association, Defendants-Appellees.

No. 98-15579.

United States Court of Appeals,
Ninth Circuit.
Argued and Submitted March 9, 1999.

Decided May 12, 1999.

* * * *

[1103]Before: FERNANDEZ and McKEOWN, Circuit Judges, and WEINER,[1] District Judge.

Opinion by Judge FERNANDEZ; Concurrence by Judge McKEOWN.

[1104]FERNANDEZ, Circuit Judge:

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[1] Honorable Charles R. Weiner, Senior United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Steven Prescott, an employee of the County of El Dorado, California, appeals from a determination of the district court that granted him limited relief on his claim that the assessment of fair-share agency shop fees against him was not fair.[2] The fees were for the purpose of supporting the El Dorado County Employees Association, Local # 1 (EDCEA), the union which represents him and the other employees of the County who are in his bargaining unit. Prescott is not a member of the EDCEA. He objects to the district court's approval of the escrow provisions, its failure to order full restitution of fees, its remanding him to using the union's arbitration procedures, and its failure to strike down an indemnification provision under which the EDCEA protects the County against losses. We affirm in part, reverse in part, and remand.

BACKGROUND

Prescott, an employee of the County, is covered by a collective bargaining agreement (CBA) between the County and the EDCEA. The CBA establishes an agency shop arrangement. Employees in the bargaining unit must either be members of the union or pay a fair-share agency fee. Those who are not members, but who must pay the fair-share fee, are sometimes referred to as nonmembers or fee payers. EDCEA is an affiliate of the Public Employees Union, Local # 1 (PEU), and all dues for the EDCEA are paid to PEU. Members dues amount to 1 percent of gross salary, up to a maximum of $34, plus $1 per pay period. It appears that fee payers are not charged the $1,

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[2] Robert E. Barry, Cheryl L. Jones, Karen Pierce and Christine M. Turney also appeal. What we hold regarding Prescott applies equally to them.

which EDCEA receives and controls. EDCEA has 570 members and 114 fee payers; PEU has more than 9100 members and 482 fee payers.

In April 1995, EDCEA gave notice to nonmembers that the County would begin to deduct a fair-share fee from their paychecks, which amounted to 98 percent of the full union dues. That reflected PEU's determination that 98 percent of its expenditures were for chargeable activities, that is, activities which did benefit nonmembers. It explained that the union uses the fair-share fee to defray the costs incurred for both individual and group representation in employment relations with the County, and that the actual costs for nonchargeable expenditures were less than 2 percent. Nonmembers were also subject to a deduction equivalent to the union initiation fee (variously said to be $35 or $45). PEU's procedure was to collect the entire agency fee from all nonmember employees, but to place 2 percent of that fee into an interest bearing escrow account. The notice provided that if a nonmember did not agree with the computation "the Union will set aside 4% of the fair-share fee in an interest-bearing trust for each fee payer who registers his dissent, to be held in an escrow account...." It further explained that "[o]nce the fee payer has objected to the amount of the fees paid into escrow, he/she may demand that the fees [2%] paid to escrow be paid to them and their monthly agency fee reduced by that amount there-after."

The notice included a schedule of PEU's projected expenditures for the 1995 fiscal year, based upon expenditures for the 1994 fiscal year. Those were, it was said, reported "on a [PEU] wide basis...." The fund resulting from the $1 per member fee retained by the EDCEA, which Prescott estimates

at nearly $15,000 annually, was not separately mentioned in this, or other, financial schedules.[3] The projection identified the major categories of expenses and an asterisk was placed next to those categories which the union identified as "nonrepresentational expenditures," including (1) ideological expenditures, (2) social events, gifts and donations, (3) contributions to political education fund, and (4) **[1105]**blood bank. The notice explained that "[f]air-share fees do not include any expenses incurred for political action, social activities or organizing expenses. Organizing expenses are those incurred to bring new bargaining units into representation by [PEU]." The notice also included a statement of PEU's revenues and expenses for the 1994 fiscal year, which listed the major categories of expenses and indicated whether they were paid from the general operating fund or the political education fund. According to the 1994 statement, only contribution expenses and bank charges were paid by the political education fund. Contributions for political education and social events, gifts, etc., came from the general fund. The notice also included a letter from a certified public accountant, which reported that the 1994 statement was reviewed in accordance with standards established by the American Institute of Certified Public Accountants, and that it conformed with generally accepted accounting principles.

The district court agreed with Prescott to the extent that he objected to certain procedures that PEU had created for the purpose of challenging the fees. It, therefore, entered a

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[3] The letter did specify that the fees would be "98% of the 1% of the fee payers gross salary," while dues are "1% of gross salary, plus $1 per pay period."

preliminary injunction prohibiting the collection of fees until the procedures were corrected. *See, Prescott v. County of El Dorado*, 915 F. Supp. 1080, 1092 (E.D. Cal. 1996) (*Prescott I*). They have been corrected, but the court, upon cross motions for summary judgment, made the injunction permanent.[4] Neither the County nor EDCEA has appealed from that judgment. The district court did not otherwise agree with Prescott, and granted summary judgment against him on the other issues. Thus, he has appealed.

JURISDICTION AND STANDARDS OF REVIEW

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 & 1343. We have jurisdiction pursuant to 28 U.S.C. § 1291.

We review the district court's grant of summary judgment de novo. *See Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir.1996). That, of course, means that we must determine for ourselves whether "genuine issues of material fact exist and whether the district court correctly applied the relevant substantive law." *Id.* Insofar as Prescott attacks the indemnification provision between EDCEA and the County, standing is in question. We review standing questions de novo. *See San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1124 (9th Cir.1996).

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[4] The parties indicated to the district court that the case could be decided on summary judgment. Although it was somewhat dubious, the court took them up on that.

DISCUSSION

While the district court did grant partial relief to Prescott, it deflected his attacks on the adequacy of the financial statements regarding PEU's and EDCEA's income and expenses, about the size of the required escrow account, about the need for full restitution to Prescott, about the proper forum to decide whether the fair-share fee was fair, and about the propriety of the indemnification clause in favor of the County. In short, Prescott won a skirmish and continues to hold that piece of ground, but he lost the rest of the engagement. He asks us to come to his rescue. We shall, in part. In order to do so, we must survey the contours of the field adumbrated by the Supreme Court.

From the very beginning, the Court has expressed the view that, while it is appropriate to impinge upon objecting employees' freedom of choice in order to require those who share in the benefits of union representation to help "defray the expenses ... of collective agreements, [and] the expenses entailed in the adjustment of grievances and disputes," it is not appropriate to take their money "to support candidates for public office, and advance political programs" of the union. *International Ass'n of Machinists v. Street*, 367 U.S. 740, 768, 81 S.Ct. 1784, 1800, 6 L.Ed.2d 1141 (1961). And it is the union, **[1106]**not the employee, that bears the burden of demonstrating just what proportion of union expenditures is devoted to functions other than those which can properly be charged to dissenting employees. *See Brotherhood of Ry. and S.S. Clerks v. Allen*, 373 U.S. 113, 122, 83 S.Ct. 1158, 1163-64, 10 L.Ed.2d 235 (1963).

Those earlier cases involved the unique area of railroading, but when it was called upon to consider the area of public employee unions, the Supreme Court reached the same conclusions. Again, it recognized the fact that agency shop provisions do impinge upon an employee's freedom of choice, but emphasized the more potent fact that they counteracted the incentive to become a free rider, who refuses to contribute to the union while happily obtaining the benefits of union representation. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 221- 22, 97 S.Ct. 1782, 1792-93, 52 L.Ed.2d 261 (1977). Again, it declared that an objecting employee could not be forced to pay dues or assessments to support or advance the union's political or ideological causes, which were "not germane to its duties as collective-bargaining representative." *Id.* at 235, 97 S.Ct. at 1800. Then, in *Ellis v. Brotherhood of Ry. Airline & S.S. Clerks*, 466 U.S. 435, 448, 104 S.Ct. 1883, 1892, 80 L.Ed.2d 428 (1984). The court summed up as follows:

> Hence, when employees such as petitioners object to being burdened with particular union expenditures, the test must be whether the challenged expenditures are necessarily or reasonably incurred for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues. Under this standard, objecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and administering a collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit.

Id. at 448, 104 S.Ct. at 1892.

So much for the substance, but what about the procedure? The Court addressed that question in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), where it concluded that "the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Id.* at 310, 106 S.Ct. at 1078.

It is with these general principles in mind that we turn to the principal disputes in the agon between Prescott and the EDCEA.

A. *Explanation of the Basis of the Fee*

There can be little doubt that PEU did give a rather detailed notice and a goodly amount of explanation of the fee to the nonmember fee payers. But quantity is not necessarily quality, and Prescott claims that the notice fell short because the financial schedules were not properly verified. That the schedules were not audited can hardly be doubted, but EDCEA asserts that they need not be. The district court agreed. *See Prescott I*, 915 F.Supp. at 1089-90. We do not.

An accountant or auditor can provide three levels of service: a compilation, a review, or an audit. A compilation involves the preparation of a financial statement regarding which the accountant expresses no assurance of accuracy,

completeness, or conformity with generally accepted accounting principles. Larry P. Bailey, *Miller GAAS Guide* 14.19-14.20 (1999). A review constitutes a higher level of service, resulting in an expression of limited assurance. In a review, an accountant relies on the representations of [1107]management to issue a report "stating that he or she is not aware of any material modifications that should be made to the financial statement in order for it to be in conformity with" generally accepted accounting principles. *Id.* at 14.25; *see generally, id.* at 14.25-14.28. In contrast, an audit consists of sufficient independent examination to express an opinion on the fairness, in all material respects, of the financial statement. *Id.* at 1.03, 11.05-11.06. An audit, unlike a review, generally requires the accountant to assess the organization's internal control procedures, examine evidence supporting the amounts in the financial statement using an appropriate sampling frequency, observe inventories, and confirm accounts receivable. *Id.* at 14.25-14.26, 11.05-11.06; *see id.* at 9.03-9.31 (sampling techniques). Although audits may vary in procedures and sampling rates, and therefore in level of audit risk, *see id.* at 9.05-9.07, an audit, as opposed to a review, offers at least some verification of the amounts disclosed in the financial statement.

The Supreme Court has emphasized that, "[l]eaving the nonunion employees in the dark about the source of the figure for the agency fee—and requiring them to object in order to receive information—does not adequately protect" them. *Hudson*, 475 U.S. at 306, 106 S.Ct. at 1076. In elaborating what sufficient information might be, the court said that, "[t]he Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as

verification by an independent auditor." *Id.* at 307 n. 18, 106 S.Ct. at 1076 n. 18. Later on, the Court returned to that theme when it spoke of the weight of "a certified public accountant's verified breakdown of expenditures...." *Id.* at 310, 106 S.Ct. at 1077. And yet again the Court spoke of a determination made "on the basis of the independent audit," and stated that an escrow figure "must itself be independently verified." *Id.* at 310 n. 23, 106 S.Ct. at 1078 n. 23.

Those statements would seem to make it clear enough that what is required is a real independent verification of the financial data in question to make sure that expenditures are being made the way that the union says they are. For example, was an amount supposedly directed to "x" for negotiation expenses really dispersed to him, or did it go to "y", who is a union lobbyist? The district court did not believe that the Supreme Court really meant what it seemed to have said, but we have no doubt that the Court did understand its own use of language. This is not the first time that a court has said that.

Indeed, we said as much in *Knight v. Kenai Peninsula Borough School Dist.*, 131 F.3d 807 (9th Cir.1997), *cert. denied*, ___U.S. ___, 118 S.Ct. 2060, 141 L.Ed.2d138 (1998). There we explained that "[t]he purpose of an audit is to have an independent accountant determine whether the union has actually spent the amounts of money it claimed to have spent on the chargeable activities." *Id.* at 813. We went on to reject an attempt by the union to rely on figures when "no independent accountant has determined whether [the union] actually spent the amounts it claimed to have spent on chargeable expenses in the unaudited report." *Id.* We held, therefore, that the union's notice did not satisfy *Hudson*. The holdings of other courts are

to the same effect. *See Gwirtz v. Ohio Educ. Ass'n.*, 887 F.2d 678, 682 n. 3 (6th Cir.1989) ("[A]n auditor's role is to verify the expenditures made by the union so as to ensure that the expenditures that the union claims it made for particular expenses were actually made for those expenses."); *Andrews v. Education Ass'n*, 829 F.2d 335, 340 (2nd Cir.1987) (same). We do not see how a mere review of the union's records can offer the "verification" that the Supreme Court and we have spoken of. Audits are often required in the business and public arenas, where others seek assurance that the reviewed books of an organization really do reflect the concrete world transactions to which they refer. It is just that kind of assurance that [1108]nonmembers are entitled to, even though it may prove somewhat costly to obtain it. As the Second Circuit has pointed out, it is not a question of balancing the cost to the union against the First Amendment rights of the fee payers. "Excessive cost cannot form the basis for allowing the union or the government to avoid *Hudson*'s requirement that the procedures used by the union to allocate bargaining and administrative costs be carefully tailored to minimize the intrusion on the nonmembers' rights." *Andrews*, 829 F.2d at 339. In short, a true audit was required.[5]

A somewhat smaller, yet important, piece of the puzzle is the district court's reliance on what has been called the local union presumption. *See Prescott I*, 915 F.Supp. at 1088-89. That is based on the assumption that local union units have spent their budgets in at least as favorable a way from a

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[5] We express no opinion on the exact type of audit required under *Hudson*.

nonmember's standpoint as the overall larger union unit with which they are affiliated. That scheme gives no real information about just how the more local units really did spend their funds, but it does avoid the need of detailed information at least at the notice level. *See Price v. International Union, United Auto., Aerospace & Agric. Implement Workers*, 927 F.2d 88, 93-94 (2d Cir.1991); *see also Finerty v. NLRB*, 113 F.3d 1288, 1289, 1291-92, (D.C. Cir.1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 558, 139 L. Ed.2d 400 (1997). Besides the cost savings, it has been said that there is some justification for the presumption because an objector can challenge it, whereupon the burden of persuasion on the question of the local unit's expenditures will fall upon the union. *See Price*, 927 F.2d at 94. With all due respect, that seems to put the cart before the horse because the notice is supposed to allow the nonmember to decide if there is a problem in the first place.

The reason for the presumption seems to be that the larger unit (here PEU) will certainly spend more on nonchargeable expenses than the local union (here EDCEA). But we see no reason to assume that is true. Rather, we agree with the Sixth Circuit "that such a local union presumption is unconstitutional" because " 'the use of the local union presumption increases the risk that the reduced fee collection from the objector would be in excess of what is appropriate.' " *Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422, 431 (6th Cir.1990) (citation omitted). As the Third Circuit has said, the point of the notice is not simply to tell nonmembers how the union went about its business. It is to provide "nonmembers with information sufficient to gauge the *propriety* of the fee." *Hohe v. Casey*, 956 F.2d 399, 410 (3d Cir.1992). Without conveying to nonmembers the information on EDCEA's major

categories of expenses but, rather, assuming that they were the same as those of PEU, nonmembers were left "in the dark about the portion of the fee attributable to chargeable expenses and [were] placed ... in the position of having to object to obtain the information needed to gauge the propriety of the fee." *Id.* at 411.

Nor can it be said that the amounts will always be so insignificant that *Hudson*'s demand for something less than absolute precision will always be satisfied. After all, in this case the total set aside for dissenters' challenges did not exceed 4 percent, and the amount involved in subventions to the local units was over 2 percent. Moreover, we see little reason to assume that the local units will use the same degree of care as the larger unit when it comes to handling their finances.

We do not decide that each little unit in the PEU firmament must necessarily be subjected to a separate verified audit of its expenditures, but we do decide that some auditor verifiable methodology which is more than a presumption is required if PEU and EDCEA are to fulfill their notice obligations. That methodology must be utilized with an eye on the purpose of the notice in the first place, that is to allow Prescott and others a reasonable opportu-[1109]nity to gauge whether the money taken from them is being spent on chargeable expenses.

Because the unaudited schedules attached to the notice were insufficient, we must turn to consider what steps were then required to protect Prescott.

B. *Restitution*

Prescott asserts that he must simply be given full restitution of all amounts collected from him, even though it must of necessity be true that some substantial portion of the fee was used for properly chargeable purposes. With that extreme position we do not agree.

As we see it, the court in *Hudson* did not insist on anything quite so radical; it did not see complete restitution as apodictic. Rather, it reflected on the fact that an escrow account would help alleviate the danger of even temporary use of nonmember fees for improper purposes. *See Hudson*, 475 U.S. at 309, 106 S.Ct. at 1077. It pointed out that the escrow solution alone would not solve the whole problem, if the notice was insufficient or if the challenge procedure fell short. But, even then, it did not say that a 100 percent escrow was required, and it did not hold that the proper remedy was full restitution of all collected fees. *Id.* at 310, 106 S.Ct. at 1077-78. Prescott suggests that we have already decided that the remedy *is* restitution. We have done no such thing.

Prescott seeks to support his position by pointing to our decision in *Dean v. Trans World Airlines, Inc.*, 924 F.2d 805 (9th Cir.1991). There, an airline pilot was not satisfied with the notice he was given, so he unilaterally reduced the fee demanded by the union from $36 per month to $10 per month. *Id.* at 807. We agreed with him that the union had failed to institute the proper procedures. Thus, we said, "the union has no right to enforce an agency shop agreement to collect fees for use in any union activity beyond collective bargaining" and its failure to comply with *Hudson* "can serve as a justification for Dean's

unilateral reduction of fees." *Id.* at 809. Nothing in that determination suggests that a nonmember employee is entitled to full restitution whenever the union stumbles in its efforts to comply with *Hudson*.

Similarly, in *Knight*, upon which Prescott also relies, we merely said that the union's failure to comply with *Hudson* meant that it "was not entitled to the fees that it collected." 131 F.3d at 815. We did not say that meant that the union could not receive any fees whatsoever, and we went on to say that the employee was entitled to relief, but that we would "leave the measure of damages and the suitability of other relief for the district court to determine in the first instance." *Id.* Had we believed that the measure was simply complete restitution, we could easily have said so, but we did not and we see no reason for laying down so draconian a rule.

In our opinion, the Seventh Circuit got it just right when it said that a demand for full restitution was punitive insofar as it sought to deprive the union of fees to which it was, doubtlessly, entitled. *See Gilpin v. American Fed. of State, County, and Mun. Employees*, 875 F.2d 1310, 1315 (7th Cir.1989). It continued:

> [T]he union negotiated on behalf of these employees as it was required by law to do, adjusted grievances for them as it was required by law to do, and incurred expenses in doing these things.... The plaintiffs do not propose to give back the benefits that the union's efforts bestowed on them. These benefits were rendered with a reasonable expectation of compensation founded on the collective bargaining agreement and federal labor law....

Id. at 1316.

In fine, we agree with the district court that full restitution would be inappropriate, even though PEU did fail to meet all of its *Hudson* obligations. Any other rule would tend to suggest that the full constitutionality of the procedures and results must be established before fees are deducted. That would, as the Third Circuit [1110]has suggested, "render the escrow requirement," contemplated by *Hudson*, "completely unnecessary." *Hohe*, 956 F.2d at 406. That, of course, underscores an alternate source of protection for nonmember employees—the interest bearing escrow account itself.

C. *The Escrow*

The district court determined that the escrow cushion created by PEU's procedures was sufficient because it appeared that nonchargeable expenses were only 2 percent and, upon objection, the union would set aside 4 percent of which half went directly back to the dissenting fee payer while the other 2 percent remained in escrow pending adjudication. *See Prescott I*, 915 F.Supp. at 1091. Prescott asserts that the size of the escrow is plainly insufficient, and we are inclined to agree with him. We will explain, although we will not undertake to determine the proper amount in the first instance.

As we have already held, the difficulty here is that the procedure was flawed at its inception because of the failure to use audited financial statements. That means that the union's sanguine assumption that nonchargeable expenses amount to a mere 2 percent is unverified and provides insufficient notice to those who wish to gauge the accuracy of the union's

representations. Because the district court was satisfied with the notice, its satisfaction with the size of the escrow account followed.

Prescott was not able to point to much in the way of specific errors in PEU's calculations, but, then, if he was not left entirely "in the dark," *see Hohe*, 956 F.2d at 411, he was at least presented with a fuliginous vista. EDCEA was required to give him more illumination than it did. In many ways, "[i]t is certainly in the union's interest to disclose sufficient financial data and other information about the agency fee prior to objections by non-members. Specific substantiation of the agency fee should reduce objections by non-members. Ambiguity rarely will have this effect, however...." *Tierney v. City of Toledo (Tierney III)*, 917 F.2d 927, 938 n. 9 (6th Cir.1990).

Due to its lack of proper verification, PEU's schedules failed in that respect. But that very failure meant, of necessity, that Prescott was unable to fully carry his burden of going forward with evidence of improper allocations. *See Air Line Pilots Ass'n. v. Miller*, 523 U.S. 866, ___, 118 S.Ct. 1761, 1768, 140 L.Ed.2d 1070 (1998). He did point to some anomalies, for example, newsletter expenses and subventions to local units like EDCEA. But who is to say what else lies buried beneath the surface of the merely reviewed books?

If a nonmember fee payer has carried the burden of pointing to questionable allocations, the burden of persuading the court that an expenditure was on the correct side of the line is with the union. It has the burden of persuasion because it is seeking to mulct an unwilling person for fees and must show its

entitlement to them. *See Lehnert v. Ferris Faculty Ass'n.*, 500 U.S. 507, 524, 111 S.Ct. 1950, 1962, 114 L. Ed.2d 572 (1991); *Hudson*, 475 U.S. at 306, 106 S.Ct. at 1075-76; *Lowary*, 903 F.2d at 431; *Price*, 927 F.2d at 94.[6]

Because of the nature of the defect here, the amount in dispute for the purpose of setting up an escrow account is rather problematic. Of course, it is not satisfactory for a union to fail to make disclosures, and then comfortably sit back while the entire fee is escrowed and the nonmember employees are left to strike out at their antagonist like andabatae. *See Grunwald v. San Bernardino City Unified Sch. Dist.*, 994 F.2d 1370, 1375 (9th Cir.1993). That, however, does not mean that an interest bearing escrow procedure is [1111]improper, for there will be times when it is needed (even up to 100 percent) while the parties work out their differences. *See id.* at 1374; *Crawford v. Air Line Pilots Ass'n Int'l*, 870 F.2d 155, 161 (4th Cir.1989), *adopted en banc*, 992 F.2d 1295, 1302 (4th Cir.1993); *Hohe v. Casey*, 868 F.2d 69, 72 (3d Cir.1989); *Andrews*, 829 F.2d at 338; *see also Gibson v. Florida Bar*, 906 F.2d 624, 631 (11th Cir.1990).

In this case, the union has not acted with abandon or insouciance; it has, instead, misunderstood the financial statement requirements which we now make plain.

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[6] No doubt the protesting employee may ultimately have a separate burden of persuasion on the issue of whether he, himself, actually overpaid. *See Harmsen v. Smith*, 693 F.2d 932, 945 (9th Cir. 1982). We suppose that in most instances resolution of that issue will be parasitic on the determination regarding the union's allocation, but do not hold that is necessarily so.

Nevertheless, it cannot be said that a mere 4 percent of the union's charges remains in reasonable dispute. We are dubious about the suggestion that the amount in dispute should be considered to be as high as 100 percent; surely PEU is using some substantial amount of the fees charged for plainly proper purposes. We say this with some trepidation, because it can easily be argued that unverified financial statements are like no information at all. Again, that does appear to overstate matters, and we do not think it our place to attempt to determine precisely how much should be set aside under the circumstances of this case. That, like other determinations in this area, is more properly for the district court in the first instance. *See Hudson*, 475 U.S. at 310, 106 S.Ct. at 1078.

Once it is recognized that further proceedings are necessary, the next question is: in what forum should those proceedings take place?

D. *The Forum*

The district court determined that the disputes between EDCEA and Prescott over the allocation of expenses between those which were chargeable and those which are not must be handled through the arbitration procedure created by PEU pursuant to *Hudson*. In that it erred.

As we have said previously, "nonmembers are not required to exhaust union remedies to which they did not agree before challenging the chargeability determinations in federal court." *Knight*, 131 F.3d at 816. Since then, the Supreme Court has also so decreed. There is "no warrant for blocking dissenting employees from bringing their claims in federal court in the first

instance, if that is their preference." *Miller*, 523 U.S. at ___, 118 S.Ct. at 1768. Therefore, "unless they agree to the procedure, agency-fee objectors may not be required to exhaust an arbitration remedy before bringing their claims in federal court." *Id.* at ___, 118 S.Ct. at 1769.

E. *Indemnification*

Prescott finally complains about the district court's failure to accord him standing to object to the provision which required EDCEA to indemnify the County from any liability which arises out of deductions of fees from employee wages, and to provide a defense against any claims. We agree with the district court.

We have alluded to this issue before. In *Knight*, 131 F.3d at 817, we determined that a public entity did not even have a duty to fee payers until the union sought to take some action against them for failure to pay the fees. However, we declined to entertain an attack upon an indemnification provision because the issue had been waived by the failure to raise it in the opening brief. *Id.*

Here, the issue has not been waived, but Prescott hurdled that trench only to run into a standing revetment. In order to meet constitutional standing requirements, a plaintiff must establish three elements.

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized ... and (b) "actual or imminent, not 'conjectural' or 'hypothetical'...." Second, there must

> be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent ac-[1112]tion of some third party not before the court." ... Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992) (citations omitted); *see also, Bennett v. Spear*, 520 U.S. 154, 167-71, 117 S.Ct. 1154, 1163-65, 137 L.Ed.2d 281 (1997); *Maricopa-Stanfield Irrigation & Drainage Dist. v. United States*, 158 F.3d 428, 433-35 (9th Cir.1998), *cert. denied*, ___ U.S. ___, 119 S.Ct. 1802, 143 L.Ed.2d 1007 (1999) (No. 98-1115). Prescott cannot meet these strictures.

While it can be assumed that Prescott suffered some injury when the fees were deducted from his paycheck, that is all he has shown. He certainly cannot show any connection between the indemnification agreement and that injury. The agreement does no more than place the ultimate cost of any impropriety in the notice and the procedures where it belongs—on the union, which seeks the fees. Just how any injury can be traced to the indemnification provision itself is entirely unclear, but for Prescott's claim that the provision will somehow cause the County to ignore its own duties. But that argument is no more than rank speculation, and any breach of the County's duty can hardly be said to be traceable to the indemnification provision itself.

Speaking of speculation, it can hardly be said that our striking down of the provision would lead to some irenic world wherein all fee deduction procedures were properly followed because someone would finally have an incentive to assure that they were. As EDCEA points out, someone—the union—already has that incentive in a powerful form. A failure to perform its duties properly "may result in its being unable to retain a portion of the fair share fee." *Hohe*, 956 F.2d at 412.[7] A failure to comply may also involve the union in substantial and expensive litigation, witness this case which has been in progress for over three years and will not be over for some time yet. Moreover, Prescott can suffer no ultimate damage to his interests because nothing in the indemnification agreement will prevent him from collecting any costs, expenses or losses imposed upon him by reason of the defective procedure.

In short, it simply cannot be said that any injury suffered by Prescott is fairly traceable to the agreement, nor is the claim that our striking of the agreement would redress or prevent the injuries that he has suffered anything but speculative.

CONCLUSION

In cases like this, the desire of unions to assure that everyone in the bargaining unit pays for the costs of the benefits conferred upon him runs up against the desire of employees to join and support what they like when they like. Thus, cases of this type can generate high emotions and lend themselves to

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[7] It should be noted that in *Hohe* the court suggested that there was standing, but did not decide the issue. *Id.* at 411.

philippics—the nonmember employees are sometimes called radicals or free riders and the unions are sometimes said to be insincere hypocrites who simply seek more money to manipulate. Here, however, no one claims that we face either sansculottes on the one hand or pecksniffians on the other. Rather, it is clear that we are dealing with individuals who have an honest dispute over what the Constitution requires.

There is nothing new about the requirement that PEU and EDCEA must send out a proper notice to all nonmember employees, but we now make it clear that the financial statements accompanying the notice must be audited (not merely reviewed) in order to *assure* that "the union has actually spent the amounts of money it claimed to have spent on the chargeable activities." *Knight*, 131 F.3d at 813.

In the meantime, all disputed fees, and absent an audited statement that could be a very substantial portion of what the union has charged, must be deposited into an interest bearing escrow account. The district court must then determine just what is chargeable and what is not. However, full restitution of the fees is not required if, as we think will surely be the case, at least some portion will be allocated to properly chargeable expenses.

AFFIRMED in part, REVERSED in part, and REMANDED. The parties shall bear their own costs on appeal.

McKEOWN, Circuit Judge, concurring:

Although I agree that the PEU's notice does not satisfy the requirements of *Chicago Teachers Union, Local No. 1. v. Hudson*,

475 U.S. 292, 306, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), and that remand is therefore necessary, I write separately because I believe that the majority unnecessarily reaches the issue of the constitutionality of the local union presumption.

We all agree that the PEU's failure to provide audited verification of its expenses violates *Hudson*. Because it is clear that the local affiliate, EDCEA, cannot rely on the parent union's (PEU's) constitutionally insufficient data, we need not decide the issue of the constitutionality of the local union presumption. While the majority properly interprets the Supreme Court's decision in *Hudson*, it ignores the Supreme Court's strong warning against premature adjudication of constitutional questions:

> As we have explained: If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable.... It has long been the Court's considered practice not ... to decide any constitutional question in advance of the necessity of its decision ... or to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.

Clinton v. Jones, 520 U.S. 681, 690 n. 12, 117 S.Ct. 1636, 137 L.Ed.2d 945 (internal quotation marks and citations omitted).

If the notice based on the parent union's data is legally deficient, then the derivative data is similarly tainted for notice purposes. The "doctrine of avoidance," *id.* at 690, requires that we not reach out to decide whether the local union presumption

passes constitutional muster as a general matter when, on the facts presented here, the EDCEA's reliance on the PEU's data is itself constitutionally deficient. In light of our reversal, at this point, the majority is only speculating as to what local union data the EDCEA and the PEU might bring before the district court on remand.

In addition, I have no doubt about the good faith of the parties in presenting this case, and do not join in the majority's gratuitous (and, by its own recognition, inapt) commentary regarding the conduct of other litigants in "cases of this type."

APPENDIX F

FINAL JUDGMENT IN A CIVIL CASE ENTERED BY THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

1 April 1998

[Clerk's stamp omitted in printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

STEVEN H PRESCOTT

v. CASE NUMBER: CIV S-95-1859 LKK JFM

COUNTY OF EL DORADO, et al

XX - - **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF 1/26/98.

Jack L. Wagner,
Clerk of the Court

ENTERED: April 1, 1998

by: /s/
K Carlos, Deputy Clerk

APPENDIX G

OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

26 January 1998

[Clerk's stamp omitted in printing]
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

STEVEN H. PRESCOTT, et al.,

NO. CIV. S-95-1859 LKK/JFM

Plaintiffs,

v. ORDER

COUNTY OF EL DORADO, et al.,

Defendants.

_____/

The Plaintiffs, non-union employees of El Dorado County (the "County"), challenge the right of the El Dorado County Employees Association ("EDCEA" or the "Union"), as a local affiliate of the Professional Employees Union, Local #1 ("PEU"), to collect fees pursuant to the agency shop provisions of the collective bargaining agreement entered into between the Union and plaintiffs' employer.

In its previous order the court preliminarily enjoined the Union from collecting a fair share agency fee until it provided a challenge procedure which allowed for the dispute to be resolved within 120 days from the date on which the fee was seized from the nonmembers' paychecks. *See Prescott v. County of El Dorado*, 915 F. Supp. 1080 (E.D. Cal. 1996). The court also ordered the Union not to impose upon nonmembers the "under penalty of perjury" and specificity requirements for challenging the fee. *Id.* The court, however, denied the balance of plaintiffs' motion. First, the court found that the notice provided an adequate basis for the fee because it identified

PEU's major expense categories and provided nonmembers with sufficient information to ascertain which of those categories the Union deemed chargeable to nonmembers. The court reasoned that under *Chicago Teachers Union, Local No. 1, AFL-CIO v. Hudson* ("*Hudson*"), 475 U.S. 292, 306, n.18 (1986), the Union is only required to provide the nonmember with sufficient information to decide whether to challenge the legitimacy of the Union's fee, and did not require that the Union justify its expense in detail prior to the challenge. Employing the "local union presumption," the court also held that PEU need not provide a breakdown of the expenditures for each local affiliate, since local affiliates generally spend less money on political activity than state or national unions.

Recognizing the very limited record describing the difference between various types of financial reviews, the court also determined that, while adequate notice under *Hudson* must include "verification by an independent auditor," an accountant's "review" appeared to provide the verification required by the Supreme Court. The court noted, however, that the lack of a full record deprived it of an opportunity to definitively resolve the issue. *See Prescott*, 915 F. Supp at 1089, n. 13. Finally, the court held that plaintiffs did not demonstrate a likelihood for success on their challenge to the 4% escrow figure because plaintiffs did not show that more than 4% was reasonably in dispute.

The parties now cross move for summary judgment. Plaintiffs continue to maintain that the notice and procedures violate the First, Fifth and Fourteenth Amendments because they (1) do not contain audited financial disclosures of the expenditures of EDCEA and affiliated labor organizations

receiving money from EDCEA, (2) utilize an unconstitutional standard of chargeability, and (3) contain unduly burdensome procedures for challenging the fee. Plaintiffs seek a declaratory judgment stating that the defendants have violated the constitutional requirements for collecting an agency fee, a permanent injunction against all fee "seizures" from the nonmembers, and restitution of all fees already "seized" from nonmembers. Finally, plaintiffs request a declaratory judgment that the indemnification agreement between the County and EDCEA is void as against public policy.

Defendants argue that the court should grant them summary judgment primarily for the reasons discussed in the court's preliminary injunction order. With regard to the "verification by an independent auditor" required by *Hudson*, defendants argue that an accountant's review suffices because it provides nonmembers with the information pertinent in assessing the validity of the fee, and that an audit would burden the Union with an unnecessary cost. Defendants also move to dissolve the preliminary injunction on the basis that the Union has instituted a procedure which permits a nonmember to have a hearing within sixty days from making a challenge to the fee, and to obtain a final decision within thirty days from the hearing. I turn first to a brief description of the overall problem, and then address the particular claimed deficiencies.[1]

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[1] The standards for resolution of a matter on summary judgment are well-known and need not be repeated here. *See, e.g., Clark v. County of Placer*, 923 F. Supp. 1278, 1281-82, (E.D. Cal. 1996).

The High court has held that there are "constitutional requirements for the Union's collection of agency fees [which] include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." *Hudson*, 475 U.S. at 310. The purpose of the prerequisites is to insure that nonunion employees have "a fair opportunity to identify the impact of the governmental action on his interests and to assert a meritorious First Amendment claim." *Hudson*, 475 U.S. at 303. In sum, the procedures seek to insure that the nonmember has sufficient information to make an intelligent choice to either accept or challenge the fee. *Id*; *see* also, *e.g., Damiano v. Matish*, 830 F.2d 1363, 1370 (6th Cir. 1987) (disclosure must provide nonunion employees with sufficient information so as to enable them to make an intelligent choice), and *Laramie v. County of Santa Clara*, 784 F. Supp. 1492, 1497 (N.D. Cal. 1992) (union must "provide enough information to nonmembers so that they may understand the charges and then reasonably challenge the basis of the fair share").

I.
THE ROLE OF THE INDEPENDENT AUDITOR

The Court explained in *Hudson* that "practical reasons" preclude "'[a]bsolute precision' in the calculation of the charge to nonmembers" and thus "cannot be 'expected or required.'" *Hudson* 475 U.S. at 307, n.18. Moreover, the Court held that "[t]he Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures." *Id*. Nonetheless, the Court decreed that "adequate disclosure surely would include

the major categories of expenses, as well as verification by an independent auditor." *Id.*

Clearly the Court's footnote recognizing "practical considerations," abjuring "absolute precision," but requiring the "verification by an independent auditor" raises more questions than it answers. Thus, unanswered are the level of verification short of absolute precision required, whether the verification, although it must be performed by an independent auditor, must be in the form of an audit, and whether what must be verified is the breakdown between chargeable versus nonchargeable expenses.

A. VERIFICATION OF ALLOCATIONS

In its prior order this court rejected plaintiffs' contention that the independent auditor must verify the allocation between chargeable and nonchargeable expenditures within each major expense category. *See Prescott*, 915 F. Supp. at 1087. At oral argument on this motion, counsel for plaintiffs' counsel asserted that the auditor's function is to provide a verification of the expenditures such that the Union, and the nonmembers, can confirm that those expenditures which the Union claims are nonchargeable are actually spent on those matters which the Union characterizes as nonchargeable. Accordingly, the court affirms its prior order that the auditor need not verify the allocation between the chargeable and nonchargeable expenditures within each major expense category. Below in addressing the question of what level of "verification" is required under *Hudson* the court will further consider the auditor's role in the process.

B. THE MEANING OF "VERIFICATION"

The parties agree that the Union's accountant performed a "review" of PEU's books rather than an "audit." The dispute is whether such a review satisfies the requirement for "verification by an independent auditor." To resolve the dispute, the court applies its understanding of *Hudson* to the evidence adduced by the parties in connection with this motion.[2]

Defendants acknowledge that their accountant's review of PEU's financial statements did not constitute a "verification by an independent auditor. . . [w]ithin the meaning of the accounting profession. . . ." Charles A. Luther Depo. At 81.[3] Plaintiffs argue that by using the term "auditor" the Supreme Court mandated that the person performing the "verification" must perform an audit as that term is defined by the accounting profession.

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[2] At oral argument, both counsel assured the court that the case could be resolved on summary judgment based upon the record now before me. While the court believes that a full trial would be helpful, particularly in relation to the duties of accountants, the parties' position weighs heavily against the court's insisting on trial.

[3] Luther, the Union's accountant testified that the phrase "verification by an independent auditor" within the accounting profession "deals with the preparation of some form of audited statement." Luther Depo. at 81. Plaintiffs' expert puts it that "[o]ne such level of service [provided by an accountant] includes functioning as an 'independent auditor.'" *See* Decl. of Irving B. Ross at ¶ 12.

Plaintiffs' argument confuses the question of who must perform, "an independent auditor," with what must be performed, disclosure and verification of "the major categories of expenses." Both parties agree that an "auditor can be an accountant," and that an accountant can perform both reviews and audits. Put simply then, an independent auditor could be either an accountant performing a review, or an accountant performing an audit. Thus, the High Court's use of the term "independent auditor" does not command an audit.

Yet a second reason suggests that the professions' understanding of the phrase is not dispositive. Nothing in *Hudson* suggests either that the Supreme Court was aware of the meaning attributed to the phrase by the accounting profession, or that it intended to apply that meaning.[4] Rather, reading the phrase in the context employed by the High Court suggests something quite different than the elaborate procedures contemplated by the profession.[5] Concluding that the phrase

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[4] Indeed, the language employed by the Court suggests that it was not speaking in the language of accountants. As one declaration puts it, "[p]rofessional reporting standards utilized by accountants do not use the term 'verification.' CPAs provide compilation, review, audit, or attestation services and, as a result of the services, provide reports or opinions." Decl. of John D. Moyle, at ¶ 8.

[5] Plaintiffs' leap from who to what is shared by most reported cases. Nonetheless, even requiring an audit does not resolve the question of the scope of the task, given the variety of audit types existing within the accounting profession. *See Gwirtz v. Ohio Educ. Ass'n.*, 887 F.2d 678, 681 (6th Cir. 1989) (Auditing Standard No. 29 proper reporting mechanism and constitutes independent audit

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employed by the court is not self-defining, I turn to the Court's explanation the purpose of verification.

The Supreme Court explained that the purpose of verification is to permit the nonmember an opportunity to make an informed choice of whether to challenge the basis for the fee. Accordingly, the Court merely required that unions provide an explanation of the major categories and that those categories be verified.[6] As this court understands the evidence before it, a

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[5] (...continued)
because it subjects financial statements to detailed testing); *Hohe v. Casey*, 727 F. Supp. 163, 167 (M.D. Pa. 1989) (auditor must perform evaluation of client's internal controls sufficient to form an opinion); *Mitchell v. Los Angeles Unified School Dist.*, 744 F. Supp. 938, 941, n.4 (C.D. Cal.) (modified SAS 29 audit verifying expenditures claimed actually made suffices if performed in accordance with generally accepted accounting principles) *rev'd on other grounds by* 963 F.2d 258 (9th Cir. 1992); *but see Laramie*, 784 F. Supp. at 1497 ("review" suffices).

There are also higher levels of verifications than an audit (e.g., attestation) and different levels of assurances within the auditing function. *See* Ross Decl. at ¶ 12 (an "attestation" is an "extension of the generally accepted auditing standards."); *see also* Luther Depo. at 72 (noting that the American Institute of Certified Accountants has set forth 66 different auditing standards).

[6] This court has no doubt that dicta in its previous opinion has added to the confusion. There, in rejecting plaintiffs' contention that the auditor must verify that the allocation of expenditures between chargeable and nonchargeable categories, I opined that the role of the auditor is to "ensure that the expenditures which the union claims it made for certain expenses were actually made for those expenses." *Prescott*, 915 F. Supp. at 1087 (quoting *Laramie*, 784 F. Supp. at
(continued...)

review satisfies the "categorical" verification and an audit (at whatever level) while providing greater assurance concerning the expenditures reported, does not provide additional information regarding the classification of expenses in the financial statements.

Plaintiffs' expert explains that an accountant performs an audit to express a "conclusion about the reliability of a written assertion that is made by another party[.]" *See* Ross Decl. at ¶ 12. An audit "is concerned with whether the recorded information properly reflects the economic events that occurred during the accounting period." *Id.* at ¶¶ 12, 14, 16.[7] In contrast, an accounting review is "the process of recording, classifying and summarizing economic events in a logical manner for the purpose of providing financial information." *Id.* at ¶ 14.[8] Defendants' expert, John D. Moyle, agrees that an

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[6] (...continued)
1497). This court's previous opinion, while citing to various Circuit Court opinions, failed to address the more modest purpose articulated in *Hudson* itself. To the extent the previous dicta conflicts with this opinion, the court must disavow it.

[7] The techniques employed during an audit "include a study and evaluation of the client's internal accounting controls, tests of accounting records, and the obtaining of corroborating evidential matter through inspection, observation and confirmation." *See* Ross Decl. at ¶ 12.

[8] These descriptions are corroborated by plaintiffs' experts' citation to various accounting texts which describe auditing as a function which provides a verification of financial data by testing the validity of the data, as opposed to the acceptability of its presentation.
(continued...)

audit tests evidentiary matter to provide a reasonable assurance that records are accurate, while a review assesses whether the material is presented according to accepted classifications. *See, supra*, n.6.[9]

PEU's accountant's explanation of the auditing and review functions confirms the distinctions highlighted above. Luther testified that the difference between a review and an audit is that an audit would normally include the observation of physical inventory and analysis of documents, *see* Luther Depo. at 12-13, while a review would involve discussions with personnel and analysis of documents to insure that the expenditures were

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[8] (...continued)
See Suppl. Ross Decl. at ¶ 8 (citing Alvin A. Arens, et. al., *Auditing, An Integrated Approach* (5th ed.); Kell, Boynton, & Ziegler, *Modern Auditing* (3rd ed.), Chapter 2, p. 46).

[9] Moyle further explains that an "auditor performs tests of the accounting systems and records to obtain sufficient competent evidential matter to afford a reasonable basis for an opinion regarding whether the financial statements, are, in all material respects, fairly presented in accordance with GAAP." *See* Moyle Decl. at ¶ 12. In the next paragraph of his declaration, Moyle states that the purpose of an auditor's opinion is to provide "reasonable assurance". *Id.* at ¶ 13. This purpose indicates that the focus of the audit is on testing the reliability of the records. In contrast, Moyle explains that the review is limited to "negative assurances" that nothing came to the CPA's attention that would indicate that the management's assertions are not presented in accordance with the established criteria. *Id.* at ¶ 16. Since a review is based on "negative assurances," it will approve of the financial statements so long as they are presented according to accepted classifications; there will be no independent verification that the presentation is an accurate reflection of reality.

properly classified. *Id.* at 24-26.[10] Although Luther asserts that PEU's final review statement reflected changes made to the information as provided by the client, *id.* at 63, his description of those changes demonstrates that they revolved around classification of statements.[11]

Defendants contend that a review is sufficient under *Hudson* given that under accounting standards the fair presentation of financial statements is the responsibility of the entities' management. Moyle Decl. at ¶ 10. Once again, it is unclear to the court why accounting standards should govern. Nevertheless, the contention is consistent with *Hudson*'s requirement that the Union provide the categories of expenditure with the independent auditor verifying them.[12]

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[10] Luther testified that he received expenditures information, receipts, and specific coding to asset or liability categories from PEU. *See* Luther Depo. at 55. He then produced a ledger which contained a separate account for each category of assets, liabilities, and equity. *Id.* at 37-38. Luther explains that the categories he created do not necessarily reflect the internal accounting system of the union, but are similar to it. *Id.* at 41. Luther's working documents were based on information and documentation provided by the client, and sometimes information specifically requested by the accountant. *Id.* at ¶¶ 46, 48.

[11] For example, Luther testified that if he came across a check during a review which appeared to be submitted by the client in the wrong category, he would normally recommend that it be reclassified into the proper category. *See* Luther Depo. at 50. Luther then testified that if the client refused to reclassify, and if the failure was material, he might not issue the review. *Id.* at 50-51.

[12] As this court understands the evidence, a review verifies the

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Moreover, a conclusion that a review satisfies *Hudson* is consistent with its emphasis on practicalities. *See Hudson*, 475 U.S. at 307, n.18. In his deposition, PEU's accountant estimates that he billed PEU between $2,500 and $3,000 for the reviewed financial statement for the 1994 year. *See* Luther Depo. at 20. Based on his personal experience, Luther testified that an audit covering the same scope as the review would costs between $12,000 and $15,000. *Id.* at 22 & 74. He also testified that it would cost as much as $45,000 to do an audit of all units. *Id.*

While to say the least the matter is not free from doubt, the court concludes on the basis of the above considerations that a review satisfies the *Hudson* purpose. Accordingly, no higher verification is required, although it may be desirable.[13]

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[12] (...continued)
classifications made by the union. The ordinary meaning of "classification" is "the act or a method of distributing into groups, classes, or families: an assigning to a proper class." The ordinary meaning of "classify" is "to group or segregate in classes that have systematic relations usu. founded on common properties or characters: sort." *See* Webster's Dictionary, at 417, col. 1. Thus, the act of classifying, the process being verified by a review, appears to be what the High Court required the union to provide verification of through an independent auditor.

[13] It must be kept in mind that what is being considered is constitutional minima, and not what might be the most efficacious process. Although aspects of *Hudson* may suggest otherwise, neither this court, nor the Supreme Court for that matter, is in the business of legislating.

Accordingly, summary judgment will be entered on behalf of defendants as to this claim.

II.
SUFFICIENCY OF THE ESCROW

The court in its previous order explained why it believed that plaintiffs' challenge to the escrow amount does not lie. Plaintiff challenges that explanation on the basis that the court has failed to apply rigorous First Amendment standards. As I explained there, however, the language of the First Amendment hardly commands any of the procedures developed in *Hudson*. Rather, the procedures mandated by the Supreme Court must be viewed as providing a prophylactic border surrounding First Amendment values. As such, however, they must be balanced against the competing interests of fairness and labor peace embodied in the agency shop. *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 218 (1977). In resolving these competing values the High Court requires unions to escrow "the amounts reasonably in dispute while such challenges are pending." *Hudson*, 475 U.S. at 310. In the matter at bar, this court continues to find that plaintiffs have not demonstrated that an amount greater than 4% is in dispute. Accordingly, injunctive relief will not be granted, and defendants' motion for summary judgment will be granted.[14]

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[14] The court wishes to emphasize that it is not finding that 4% in fact represents the amount of nonchargeable expenditures. Indeed, defendants' counsel's acknowledgment during oral argument that the union did not keep records of the labor and expenditures involved for many of its political activities raises substantial questions as to the

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III.
LOCAL UNION PRESUMPTION

In its preliminary injunction order the court relied on the local union presumption. Plaintiffs claim that the decisions cited by the court to support the local union presumption have been superseded. *See Lowary v. Lexington Local Bd. of Educ.* (*"Lowary II"*), 903 F.2d 422, 430 (6th Cir. 1990), *superseding Gillespie v. Willard City Board of Education*, 700 F. Supp. 898, 903 (N.D. Ohio 1987); *Hohe v. Casey*, 956 F.2d at 399, 409-11 (3rd Cir. 1992), *superseding Hohe v. Casey*, 695 F. Supp. 814, 819 (M.D. Pa. 1988), *aff'd*, 868 F.2d 69 (3rd Cir. 1989), *cert. denied*, 493 U.S. 848 (1989). Plaintiffs also contend that *Tierney v. City of Toledo*, 917 F.2d 927, 937 (6th Cir. 1990) rejects the local union presumption. They then contend that this court should follow suit. For the reasons explained below, the court declines to do so.

The *Tierney* decision is inapposite. There, the Sixth Circuit addressed the failure of a local union to explain how the dues paid to the international union were spent. Here, plaintiffs challenge the Union's alleged failure to account for the expenditures of its local affiliates. Thus, the reluctance to invoke a presumption in *Tierney* makes sense for the same reason that the efficiency of invoking it here also makes sense: the local union is presumed to spend less on nonrepresentational activities. Moreover, since *Hudson* specifically required local unions to

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[14] (...continued)
manner of determining the escrow figure. The issue, however, is what is in contention, and in that regard the evidence does not demonstrate that more than 4% is in contention.

account for their payments to state and national labor organizations, *see Hudson*, 475 U.S. at 307, n.18, the Sixth Circuit had no choice but to invalidate the notice.

Lowary II is also inapposite. As this court observed in the preliminary injunction opinion, *Lowary II* rejected the presumption in the context of an arbitration hearing. Since in an arbitration, "the nonmember's burden is simply to make his objection known," *see Lowary II*, 903 F.2d at 431, it was impermissible to place an additional burden on the nonmember, during arbitration, to rebut a presumption that the union spent its money properly. *Id.* Unlike an arbitration, the presumption here does not affect the nonmembers' ability to prevail at arbitration, nor would it appear to affect his or her ability to make a decision as to whether to challenge the fee.

Plaintiff is correct about the Third Circuit's rejection of the local union presumption. *See Hohe v. Casey*, 956 F.2d at 409-11. Even if *Hohe* were binding, however, it would not be dispositive under the facts at bar. *Hohe* did not categorically reject the local union presumption; rather, it held that the union could not assume that local expenditures mirrored state expenditures when the notice itself offered no reason or explanation of why such an assumption was justified. *Id.* at 410. The *Hohe* court specifically noted that while nonmembers of the local received only information about the parent union's expenditures, they were not informed of the percentage of their local dues which went to the parent union.

In contrast to *Hohe*, the nonmembers here are told (rightly or wrongly) that all their dues go to PEU. Moreover, the figures presented in the budget provide a good explanation of

why the presumption is justified. The notice indicates that $56,544.00 of PEU's $2,626,954 budget goes to "Unit Funds." This amounts to 2.15% of the budget. Since there are 40 local units, EDCEA receives $1,413.60 (0.05% of PEU's budget). As a practical matter, there does not seem to be a high likelihood that EDCEA (or any other local affiliate) would spend a higher percentage of $1,413.60 on political activities than PEU would spend of its $2.5 million. Thus, unlike *Hohe*, the Union offers some reason why nonmembers in the local union can rely on PEU's books for a breakdown of their dues.

For the reasons discussed in the preliminary injunction order, the court still concludes that the local union presumption is appropriate and permissible under *Hudson*. *See Lucid v. City and County of San Francisco*, 774 F. Supp. 1234, 1237 (N.D. Cal. 1991) ("No authority requires such a breakdown [of expenses incurred on a bargaining unit basis] and we decline to extend existing law to create one. Requiring such a breakdown may be extremely impracticable, if not impossible, as well as unduly burdensome."); *see also Andrews v. Education Association of Chesire*, 653 F. Supp. 1373, 1377-78 (D.Conn. 1987) (without presumption, unions would be put to "the potentially prohibitive cost" of proving the individual percentages of a very large number of affiliates), *aff'd as modified on other grounds*, 829 F.2d 335, 338-339 & n.1 (2d Cir. 1987). Accordingly, summary judgment will be entered on behalf of defendants on this claim.

IV.
FAIR SHARE FEE PROCEDURES

In the prior order, the court preliminary enjoined the Union from collecting a fair share agency fee until it provided a challenge procedure which allows for the dispute to be resolved within 120 days from the date on which the disputed fee is seized from the nonmembers' paycheck. The court also ruled that the "under penalty of perjury" and specificity requirements, removed by the Union's January 10, 1996 letter, must not be re-imposed on nonmembers. Defendants now argue that the court should dissolve these order because it has continued to abide by its January 10, 1996 letter and has also voluntarily instituted a procedure which allows dissenting nonmembers to make challenges within sixty days.

The court will not dissolve the injunction. Voluntary cessation of illegal conduct does not moot a case because defendant would otherwise be free to return to its old ways. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). Accordingly, the injunction will remain permanent.

V.
INDEMNIFICATION CLAUSE

Plaintiffs assert that the hold harmless agreement between the Union and the district is void as being against public policy and that this court should so declare. The assertion raises a number of subtle and difficult questions, *viz*, is this a question of federal law since it arises in the context of procedures mandated by the Supreme Court as implementing First Amendment rights, or state law since a California contract is in

issue; in either event, how is public policy to be discovered, i.e. if federal law, is it a matter of federal common law requiring an examination of the common law as it stood at the time of the adoption of § 1983, *see, e.g., Pierson v. Rhay*, 386 U.S. 367 (1951) (§ 1981 applied against the backdrop of tort law at the time of its adoption), or if state law what doctrines of state public policy are in issue.

I begin by noting that neither party has briefed the difficult issues underlying resolution of this aspect of plaintiffs' claim, but instead rely on circuit cases, which also do not address these questions, but in any event reached opposite results. *See Hohe v. Casey*, 956 F.2d 399, 411-12 (3d Cir. 1992) (agreement to hold public employer harmless does not violate public policy); *Weaver v. University of Cincinnati*, 970 F.2d 1523, 1536-38 (6th Cir. 1992) (hold harmless agreement does violate public policy). Happily, it is this court's view that those question need not be reached, since plaintiffs have failed to show that they have standing to raise the issue.

Plaintiffs seeking declaratory relief must demonstrate standing to raise the question. Standing requires a showing that plaintiff has "personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Scott v. Rosenberg*, 702 F.2d. 1263, 1267 (9th Cir. 1993). Second, "that the injury can be fairly traced to the challenged action, [and third, that it] is likely to be redressed by a favorable decision." *Id.* (quoting *Eastern Kentucky Welfare Rights Org. v. Simon*, 426 U.S. 26, 38 (1976)); *see also Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1403, (9th Cir. 1985).

It seems relatively clear to this court that plaintiffs have not demonstrated any of the three prerequisites to standing.[15] While it may be that plaintiffs have suffered a violation of the standards enunciated in *Hudson*, that injury is the result of the Union's conduct, and is traceable to the hold harmless agreement in only the most indirect fashion. Such indirect injury is insufficient. *Eastern Kentucky*, 426 U.S. at 40. As the Ninth Circuit has observed, the mere assertion that the employer "felt freer" to shirk its duty to its employees is insufficient, without more, to establish an injury. *Knight v. Kenai Peninsula Borough School District*, ___ F.3d ___, 1997 WL 751724, at *7 (9th Cir. 1997). Having concluded that plaintiffs lack standing to raise the issue of the lawfulness of the hold harmless agreement, the court cannot reach the issue. Accordingly, summary judgment as to this claim must be entered on behalf of defendants.

VI.
RESTITUTION

Plaintiffs request complete restitution of all agency fees collected under the constitutionally deficient procedures. The request appears overly ambitious. The Supreme Court has held that restitution under § 1983 need not be more expansive than compensatory damages for it to fulfill the deterrent effect that Congress intended. *Carey v. Piphus*, 435 U.S. 247, 256-57

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[15] Relative clarity suffices. As the Supreme Court explained, resolution of standing issues tends to be a question of degree rather than kind, i.e., identifying a point on a continuum, and thus determinations of standing are "not susceptible of precise definition." *Allen v. Wright*, 468 U.S. 737 (1984).

(1978) (cited in *Lowary II*, 903 F.2d at 433). "Although some undetermined part of these fees was unconstitutionally seized, plaintiffs would be 'free riders' to the extent that plaintiffs were allowed to recover their validly chargeable expenses." *Lowary II*, 903 F.2d at 432. Morever, "awarding total restitution to plaintiffs will undermine the policy concerns of *Abood*." *Id.* at 432-33. As the Sixth Circuit observed, the proper remedy for an unconstitutional fee collection under *Hudson* is not the refund of the total fee, but the refund of that portion which was not spent on chargeable activities. *Id.* at 433 (citing *Hudson* and *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963)).

While plaintiffs have submitted evidence suggesting that they were charged amounts in excess of the Union's representational costs, it is unclear from the record whether and how much of a refund is appropriate. Given that the appropriate forum for resolution of the issue is the challenge procedure mandated by *Hudson*, the court will defer to that process. Accordingly, summary judgment will be denied plaintiff and granted defendants as to this claim.

VII.
ORDER

For all the above reasons, the court makes the following ORDERS:

1. Defendants' motion to dissolve the preliminary injunction is DENIED and the injunction is made permanent; and

2. The cross-motions for summary judgment are GRANTED and DENIED as provided above.

IT IS SO ORDERED.

DATED: January 23, 1998.

/s/

LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES DISTRICT COURT

APPENDIX H

UNITED STATES CONSTITUTION
Article III

UNITED STATES CONSTITUTION
Article III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. . . .

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States . . . .

APPENDIX I

UNITED STATES CONSTITUTION
First Amendment

UNITED STATES CONSTITUTION
First Amendment

The First Amendment provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX J

UNITED STATES CONSTITUTION
Fourteenth Amendment

UNITED STATES CONSTITUTION
Fourteenth Amendment

The Fourteenth Amendment provides in pertinent part:

> **Section 1.** . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX K

CIVIL RIGHTS ACT OF 1871
42 U.S.C. § 1983 (West Supp. 2000)

CIVIL RIGHTS ACT OF 1871
42 U.S.C. § 1983 (West Supp. 2000)

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

APPENDIX L

MEYERS-MILIAS BROWN ACT
Cal. Gov't Code § 3502.5(a)

MEYERS-MILIAS BROWN ACT
Cal. Gov't Code § 3502.5(a)

[A]n agency shop agreement may be negotiated between a public agency and a recognized public employee organization which has been recognized as the exclusive or majority bargaining agent pursuant to reasonable rules and regulations, ordinances, and enactments, in accordance with this chapter. As used in this chapter, "agency shop" means an arrangement that requires an employee, as a condition of continued employment, either to join the recognized employee organization, or to pay the organization a service fee in an amount not to exceed the standard initiation fee, periodic dues, and general assessments of such organization for the duration of the agreement, or a period of three years from the effective date of such agreement, whichever comes first. . . .

(2)

Supreme Court, U.S.
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No. 02-686

In the
Supreme Court of the United States

STEVEN PRESCOTT, ET AL.,
Petitioners,

v.

COUNTY OF EL DORADO, CALIFORNIA, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Do agency fee payers who have standing to challenge the adequacy of the notice sent them by the union pursuant to *Chicago Teachers Union, Local No. 1, AFL-CIO v. Hudson*, 475 U.S. 292 (1986), also have standing to challenge the validity of the third-party indemnity agreement between their public employer and the union?

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STATEMENT OF THE CASE

This case is the outcome of a remand order by this Court to the Ninth Circuit that it take another look at its decision in *Prescott v. County of El Dorado*, 177 F.3d 1102 (9th Cir. 1999) (*Prescott I*) (Pet. at 20a). (See *Prescott v. County of El Dorado*, 528 U.S. 1111 (2000).) That decision held, per Judge Fernandez, that with respect to the issue presented here again "insofar as [petitioner agency fee payer] Prescott attacks the indemnification provision between the [respondent union] and the County, standing is in question. We review standing questions de novo." (*Prescott I*, *supra*, Pet. at 20a.)

The Ninth Circuit's de novo review upheld the district court's opinion that petitioner lacked standing to challenge the indemnification agreement between the county and the union. Petitioners argued that this agreement obligating the union to indemnify the county "from any liability which arises out of deductions of fees from employee wages, and to provide a defense against any claims," was, if not unconstitutional, void for public policy. But the Ninth Circuit never reached that issue on the merits, finding instead that the petitioner agency fee payers lacked standing to challenge the agreement. It reached that conclusion by reasoning that

> While it can be assumed that Prescott suffered some injury when the fees were deducted from his paycheck, that is all he has shown. He certainly cannot show any connection between the indemnification agreement and that injury. The agreement does no more than place the ultimate cost of any impropriety in the notice and the procedures where it belongs—on the union, which seeks the fees. Just how any

> injury can be traced to the indemnification provision itself is entirely unclear, but for Prescott's claim that the provision will somehow cause the County to ignore its own duties. But that argument is no more than rank speculation, and any breach of the County's duty can hardly be said to be traceable to the indemnification provision itself.

(*Prescott I*, supra, Pet. at 42a.)

The Court directed the Ninth Circuit to reexamine and reconsider its decision in light of the Court's recent holding in *Friends of the Earth v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000) (*FOE*). The Ninth Circuit understood *FOE* to be "a standing case" and, since "the only portion of its decision that dealt with standing . . . discussed the issue of indemnification," interpreted the remand to require the district court to "address the standing issue in the first instance." (Pet. at 21a.)

The district court reconsidered the standing issue and concluded that petitioners "failed to demonstrate how the remedy they seek will prevent any future violation of their rights under *Hudson*. Although [they] may have suffered a violation of the standards enunciated in *Hudson*, that injury resulted from the Union's conduct, and, notwithstanding the defendants' stipulation, the hold harmless agreement is a cause of the injury only in the most indirect fashion." (Pet. at 16a.)

The district court discussed *FOE* and concluded that it did not alter its conclusion because "the injury suffered by the organization members in [*FOE*] could have been redressed by a favorable decision, [while] the same is not true in this case

with respect to [petitioners'] challenge to a third-party indemnity agreement." (Pet. at 17a.)

On appeal, the Ninth Circuit agreed for the second time with the district court, albeit for different reasons, that petitioners lacked standing to challenge the indemnity agreement between the county and the union. This time Chief Justice Schroeder expressly found that petitioners failed to demonstrate either the requisite causation or redressability elements of standing. As to causation, the opinion stated:

> [Petitioners' *Hudson*] injury was not caused by the employer's entry into the collective bargaining agreement; it was caused by the union's inadequate notice of expenditures on which the agency fees were based. Indeed, in this circuit, the employer has no responsibility for ensuring the adequacy of the notice; that is the union's responsibility. *Foster v.Mahdesian*, 268 F.3d 689, 694 (9th Cir. 2001); *Knight v. Kenai Peninsula Borough Sch. Dist.*, 131 F.3d 807, 817 (9th Cir. 1997). The challenged indemnification clause upon which the employer issued caused neither the union to furnish, nor the plaintiffs to receive, inadequate notice.

(*Prescott v. County of El Dorado*, 298 F.3d 844 (9th Cir. 2002) (*Prescott II*)) (Pet. at 4a.)

The Ninth Circuit also agreed with the district court that petitioners did not meet the redressability requirement for standing because "the remedy [they] seek, invalidation of the indemnity clause, does not compensate [them] for past

violations of *Hudson*, nor does it prevent future violations." (*Id.*)

It is from this opinion of the Ninth Circuit that petitioners seek certiorari review.

STATEMENT OF FACTS

Respondents respectfully refer the Court to the factual statements presented by the Ninth Circuit in its two opinions (Pet. at App. A & E, pp. 1a-5a and 22a et. seq.) for an objective statement of the pertinent background animating its most recent decision challenged by petitioners. We also add this disclaimer to petitioners' parsing of the issues presented:

The Court has been up this down staircase once before—when it remanded the case for reconsideration of whether agency fee payers had standing to challenge the indemnification clause of the collective bargaining agreement between the County of El Dorado and the union representing the county's employees. (Pet. at 3, citing to *Prescott v. County of El Dorado*, 528 U.S. 1111 (2000).) The result of that remand is now complete and presented anew for this Court to review again; but petitioners are wrong in their assertion that, beyond the narrow standing issue over the indemnification agreement for which remand was ordered, this case presents the larger issue of whether petitioners have standing to "challenge provisions of the agreement governing their terms and conditions of employment." (Pet. at i, 3.) Of course they do or do not, depending upon what "terms and conditions" of their employment we are talking about. Petitioners' broad phrasing of this phantom "standing" issue as one pertaining to their "their terms and conditions of employment" is too general to be of assistance to the Court or counsel trying to wrestle with pertinent jurisprudential

authority. It reflects, if not a peculiar ideological view of labor relations and constitutional law, an understandable penchant to make narrow, fact specific legal issues into more grandiose ones; and is analogous, and about as helpful to the question of justiciability, as saying (which is perhaps true in an ontological sense) that this case concerns the right of public employees to associate together and bargain collectively for the improvement of their working conditions without having to subsidize "free riders."

That narrow, properly framed legal issues can be, as petitioners have done here, extrapolated into more global ones for various purposes is commonly recognized, but doing so properly consigns their resolution to the political process, not to the federal courts. Only one issue is really presented by this case, and that is whether agency fee payers who have undisputed standing to challenge the adequacy of the *Hudson* notice they receive from the union, also have standing to challenge the validity of the indemnity agreement between the union and their public employer. That standing issue turns, to be sure, on the nature of petitioners' "injury," which this Court has defined and confined to the adequacy of the "notice" it requires the union to give agency fee payers, and whether the challenge to that "injury" can satisfy the requirements of traceability (i.e., legal causation) and redressability.

Mischaracterizing their purported "injury" as something other than what this Court and others have said it is – whether that be called the "seizure" of their property in the form of their fair share of agency fees by the employer, or their deprivation of standing to challenge, as they put it, that "section of the MOU [i.e., the indemnity provision]

governing their terms and conditions of employment"[1] – should not suffice to achieve certiorari. This Court should not, in other words, countenance the evasion of its holdings by a litigant's mislabeling of the nature of the injury implicated.

SUMMARY OF ARGUMENT

Two elements essential to show that petitioner agency fee payers have the standing essential to challenge the validity of the indemnification agreement between the union and the county are *causation* and *redressability*. Both are lacking here.

Petitioners cannot show the necessary causal link between their injury in fact – i.e., collection of their fair share fees by the public employer absent an adequate *Hudson* notice to them from the union – and the indemnification agreement between the union and petitioners' employer. The relationship between the injury and the indemnity agreement is too attenuated to conclude anything reasonable respecting legal cause. Petitioners fear that the indemnification agreement induces the county to act illegally with respect to petitioners' rights is just that, fear driving speculation in a vicious circle that ignores fact and logic. That the county stipulated it would not have entered into the fair share agreement without the indemnification guarantee from the union proves nothing because all elements of an agreement are indispensable to it as a whole; it can be safely said about each and every element that absent it there would be no agreement.

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[1] Pet. at 3.

Nor can petitioners meet the redressability requirement of standing because the remedy they seek, invalidation of the indemnity clause, does not compensate them for past violations of *Hudson*, nor prevent future violations.

No conflict exists between this Court's opinion in *Hudson* and the Ninth Circuit opinions in this case and others upon which it relies, namely *Foster* and *Knight*. Neither is there any meaningful conflict between the appellate opinion here and decisions of the Third and Sixth Circuits concerning standing of agency fee payers to challenge the validity of indemnification agreements between a union and the public employer of the fee payers. To the extent there may exist a conflict between the decision in this case and the Tenth Circuit's recent opinion in *Wessel v. City of Albuquerque*, 299 F.3d 1165, it is not sufficiently deep to warrant review now instead of letting the decisions percolate in the lower courts for a reasonable period to see if any differences between the two opinions can be ironed out or clarified.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH OPINIONS OF THIS COURT; AND PETITIONERS' MISLABELING OF THEIR "INJURY" FOR THE PURPOSE OF MANUFACTURING AN APPARENT CONFLICT WILL NOT WASH.

Petitioners disagree with the district and appellate courts' identification of their purported injury, which is the union's failure to provide them with adequate notice of the basis of the agency fee and to maintain a sufficient portion of collected fees in escrow pending fee arbitration (*see* Pet. at 3a), both of which are required by *Chicago Teachers Union,*

Local No. 1 v. Hudson, 475 U.S. 292 (1986). They claim that their real injury is *not* the union's failure to comply with *Hudson*, for which they obtained redress, but the public employer's withholding of agency fees.

But as *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 232 (1977) makes clear, the First Amendment is not violated by the implementation of an agency fee agreement – i.e., "to require nonunion employees, as a condition of employment, *to pay* a fair share of the union's cost of negotiating and administering a collective-bargaining agreement." (*Hudson*, 475 U.S. at 301 (emphasis added).) Rather, the only reason that the petitioners can claim *any* injury in the present case is because (as the Court of Appeals held in its first decision in this case) the union failed to comply fully with *Hudson*. Their injury, then, arises from the union's inadequate compliance, and the standing inquiry turns on the second and third prongs of the standard this Court articulated in such cases as *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560-61 (1992), and *Allen v. Wright*, 468 U.S. 737, 751 (1984) – i.e., whether they have (1) demonstrated the necessary causal link between the conduct they seek to challenge (the indemnification agreement) and their injury, and (2) whether they have demonstrated that the remedy they seek (invalidating the indemnification agreement) will redress their injury.

A. Petitioners Presented No Proof that the Indemnification Agreement between the Union and the Public Employer was the Legal "Cause" of any Inadequacy in the Union's *Hudson* Notice.

Petitioners misconstrue the nature of their "injury" to avoid addressing the real standing issues presented of causation and redressability. It is on the basis of these two

issues that the appellate opinion held petitioners lacked standing (see Pet. at 3a-5a); and as to those issues, the court was correct.

Thus, the Court of Appeals correctly rejected petitioners' argument that they could establish the requisite causal relationship merely by showing "but-for" causation based on a stipulation that the public employer would not have entered into the agency fee agreement absent the indemnification provision. This Court has previously held in the Section 1983 context that such "but-for" causation arguments are too attenuated to establish causation:

> [S]ome limitation must be placed on establishing municipal liability through policies that are not themselves unconstitutional, or the test set out in *Monell* will become a dead letter. Obviously, if one retreats far enough from a constitutional violation some municipal "policy" can be identified behind almost any such harm inflicted by a municipal official; for example, [the accused officer] would never have killed Tuttle if Oklahoma City did not have a "policy" of establishing a police force. But *Monell* must be taken to require proof of a city policy different in kind from this latter example before a claim can be sent to a jury on the theory that a particular violation was "caused" by the municipal "policy." At the very least there must be an affirmative link between the policy and the particular constitutional violation alleged.

(City of Oklahoma v. Tuttle, 471 U.S. 808, 823 (1985) (plurality opinion).)[2]

The same reasoning applies equally in the context of standing. (*See Huddy v. Federal Communications Commission*, 236 F.3d 720, 735 (D. C. Cir. 2001) (rejecting "but-for" approach to standing where there was no "inherent tendency of the [defendant]'s alleged error to produce the alleged injury," and questioning whether "'but for' causation of this sort could ever be sufficient to confer constitutional standing"); *Florida Audobon Society*, 94 F.3d 658, 670 (D.C. Cir. 1996) (*en banc*) (holding that "a protracted chain of causation fails both because of the uncertainty of several individual links and because of the number of speculative links that must hold for the chain to connect the challenged acts to the asserted particularized injury").)[3]

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[2] Although this passage is found in a section of *Tuttle* that was joined by only four justices, the Court subsequently quoted the language with approval. *See City of Canton, Ohio v. Harris*, 489 U. S. 378, 390 n. 9 (1989). Moreover, the author of the opinion of three other justices in *Tuttle* later clarified that "both the plurality and the opinion concurring in the judgment [in *Tuttle*] found plaintiff's submission inadequate because she failed to establish that the unconstitutional act was taken *pursuant to* a municipal policy rather than simply resulting from such a policy in a 'but for' sense." *Pembaur v. City of Cincinnati*, 475 U. S. 469, 484 n. 11 (1986) (plurality opinion of Brennan, J.) (emphasis in original).

[3] *See also Camden County Board of Chosen Freeholders v. Beretta USA Corp.*, 123 F. Supp. 2d 245, 257 (D.N.J. 2000) (rejecting "but-for" approach to standing and holding that, "[a]lthough proximate cause is not typically part of the constitutional standing analysis, the proximate cause approach is warranted where, as here, the plaintiff's theory of liability involves suing a defendant

Petitioners' "but-for" causation analysis – reminiscent of a Rube Goldberg contraption – is simply too attenuated and speculative to support standing in the instant case. For example, if such a "but-for" causation theory were sufficient, fee payers would have standing (assuming they could show redressability) to challenge the union's or public employer's very existence as *ultra vires*, on the theory that if the union or public employer did not exist there would be no agency fee agreement. This sort of *reductio ad absurdum* causation analysis would permit courts and counsel to foresee forever, rendering the principle of causation uncabined and unconfined.

The Court of Appeals' rejection of petitioners' other "causation" argument – that the indemnification provision removed the public employer's incentive to police the union's compliance with the *Hudson* notice requirements – was also manifestly correct because petitioners introduced no *evidence* to support their argument, but rather relied solely on speculation which is insufficient to sustain their burden of proof. (*See Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U. S. 26, 42-45 (1976).) In *Simon*, this Court held that the plaintiffs lacked standing to challenge favorable tax treatment to hospitals that denied non-emergency services to indigents. Although the Court assumed that the plaintiffs had been injured by the denial of hospital service, it rejected their arguments that the revenue ruling had "'encouraged' hospitals to deny services to indigents" and that requiring hospitals to offer non-emergency service to indigents to obtain the tax break "would 'discourage' hospitals from denying" such service. (*Id.* at 42.) The Court reasoned

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over allegedly wrongful conduct several steps removed from the end harm").

that, regardless of the tax consequences, the decision whether to provide non-emergency care to indigents would rest with hospitals, who might instead "elect to forgo favorable tax treatment." (*Id.* at 42-43.) It therefore concluded that "[s]peculative inferences" that different tax incentives would change the hospitals' behavior "will not suffice to invoke the federal judicial power." (*Id.* at 44-45.)[4]

Here, as noted above, petitioners introduced no evidence to support their speculation that the public employer knew that the union's *Hudson* notice was legally deficient, yet continued to deduct agency fees *because* the indemnification provision shielded it from liability. (*See* Pet. at 5-6.) The stipulation that the public employer would not have entered into or enforced the agency fee agreement absent an indemnification agreement is much too general to prove petitioners' contention, as it does *not* state that the public employer was aware that the union's *Hudson* notice was legally deficient, yet continued to deduct fees in *reliance* on the indemnification provision.

Moreover, the stipulation makes the instant case an extremely poor vehicle to resolve the issue of the standing of fee payers to challenge agency fee indemnification agreements because the very existence of the stipulation renders this case *sui generis*. The dynamic, give-and-take nature of collective bargaining makes it extremely difficult to predict with certainty the effect that the omission of one element of an

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[4] *See also Florida Audobon Society*, 94 F.3d at 670 (where, as here, causation depends upon a chain of inferences regarding the likely effects of the conduct of independent actors, courts "routinely refuse to permit . . . predictive assumptions," which "cannot be easily described as true or false," "to establish standing").

agreement would have upon other provisions. If they were unable to offer a public employer an indemnification provision in return for an agency fee agreement, most unions would likely offer other concessions. In such cases, it is impossible to predict whether an employer would agree to an agency fee arrangement without indemnification, because it would depend on the nature of such other concessions and their importance to the employer.

B. Petitioners Did Not and Cannot Satisfy the "Redressability" Element Necessary to Show They Have Standing to Challenge the Indemnification Clause.

The Court of Appeals' decision was equally correct as to the "redressability" prong of the standing inquiry. As the Court of Appeals held,

> Redressability requires that it be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." [*Friends of the Earth, Inc. v.*] *Laidlaw* [*Environmental Svcs. (TOC), Inc.*], 528 U.S. [167] at 181, 120 S.Ct. 693 [(2000)]. The remedy the plaintiffs seek, invalidation of the indemnification clause, does not compensate plaintiffs for past violations of *Hudson*, nor does it prevent future violations.

(Pet. at 4a.)

Certainly, invalidating the indemnification agreement is prospective relief and would not remedy any *past* injury the petitioners have incurred. At no point in the litigation did petitioners seek an order requiring the public employer or its

attorney to *repay* to the union (much less to the petitioners) any funds it had received pursuant to the indemnification agreement. Moreover, the union settled the monetary aspects of this case by refunding to the petitioners *all* of the agency fees they paid during the relevant period. Since they have already received a full refund of their fees, the invalidation of the indemnification provision cannot redress their past injury – which has already been fully redressed by the refund. Similarly, petitioners introduced no evidence to demonstrate that the violations found by the courts below, i.e., the union's failure to comply with its obligations under *Hudson*, were likely to be repeated in the future, much less that invalidation of the indemnification provision would likely be effective in preventing the repetition of such violations. Again, petitioners' argument was founded on nothing more than *speculation* as to the possible effect of the indemnification agreement.

C. Petitioners' Mislabeling of their Purported Injury is a Veiled Attempt to Get this Court to Review Another Recent Case for which Certiorari was Denied, *Foster v. Madhesian*, and Should be Repelled.

The Petition, then, is really about something besides the Court of Appeals' decision. What petitioners really seek is to avoid litigating the causation and redressability questions that the Court of Appeals grounded its decision upon, and instead relitigate the Court of Appeals' prior decision in *Foster*, 268 F.3d 689, as to which this Court recently *denied* a petition for *certiorari*. (122 S. Ct. 2327.) There is, however, no compelling reason for this Court to grant the petition in the instant case, given its denial of the petition in *Foster*.

Foster examined the issue of under what circumstances a public employer could be held liable for the union's failure to comply with its obligations under *Hudson*. *Foster* concluded that the employer does *not* incur such liability merely for making a routine payroll deduction for agency fees, as long as there is a plan in place for *Hudson* compliance, even if the union's *Hudson* compliance is deficient. In other words, under *Foster*, (1) the public employer does not have a legal obligation to police the intricate details of the union's implementation of its *Hudson* compliance plan, as long as there is such a plan in place, and (2) if there is such a plan, the public employer does not incur any such duty merely by making a routine payroll deduction for agency fees. (*See Foster*, 268 F.3d at 693-94.)

The *Foster* plaintiffs did not agree with the Court of Appeals' decision in that case and they filed a petition for a writ of *certiorari*. In their writ petition, the *Foster* plaintiffs contended that the Court of Appeals' decision conflicted with *Hudson*, as well as with the other Court of Appeals' decisions relied on by petitioners here – *Hohe*, *Tierney* and *Weaver*. (*See* Petition Writ of *Certiorari* filed in No. 01-1307.)[5] This Court, however, determined that there was nothing in *Foster* that merited review.

Petitioners in this case – who are represented by a staff attorney at the National Right to Work Legal Defense Foundation, Inc. (as were the *Foster* plaintiffs) – are really

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[5] The *Foster* plaintiffs did not raise *Wessel v. City of Albuquerque*, 299 F.3d 1186 (10th Cir. 2002), since that decision had not been rendered at the time they filed their *cert.* petition. There can be no argument, however, that *Wessel* conflicts with *Foster*, since the *Wessel* court expressly distinguished *Foster* rather than disagreeing with it. *See id.* at 1198-99.

trying to use this case as a vehicle to get a second bite at the *Foster* apple, just months after *certiorari* was denied in *Foster*. (*See* Pet. at 11-14.)

Contrary to the Petition, there is no conflict between *Hudson* and the Court of Appeals' decision in *Foster*, or as the *Foster* decision is incorporated by reference into the Court of Appeals' decision in the instant case. *Hudson* simply does not speak, expressly or impliedly, to the potential liability of a public employer for legal deficiencies in the minute details of the union's compliance with the obligations imposed in that decision. In *Hudson*, this Court affirmed in part the Seventh Circuit's reversal of the district court's judgment, rendered after a bench trial, for the defendants upholding the agency fee procedure. (*See Hudson*, 475 U.S. at 298-301; *Hudson*, 743 F.2d 1187, 1190 (7th Cir. 1984).) This Court did not affirm any judgment of liability against the public employer, since there was no such judgment below. Rather, the Seventh Circuit, whose decision this Court affirmed in part, had reversed the judgment of the district court and remanded the case for further proceedings consistent with its opinion. (*Hudson*, 743 F.2d at 1197.)

Further, there is no indication in this Court's opinion that the public employer ever raised the issue before this Court that is implicated in *Foster* – whether a public employer can incur liability for the deficiencies in the details of the union's compliance with its agency fee obligations merely by the routine deduction of agency fees. Nor does the Court's opinion in *Hudson* decide that issue, either explicitly or implicitly. To be sure, the Court did recite that the public employer accepted the union's calculation of the fair share fee, made the requested fee deductions, and did not provide fee payers with an explanation of the union's calculation or the agency fee procedures. (*See Hudson*, 475 U.S. at 296.)

But the Court's observations on this point were merely set forth in its statement of the underlying facts of the case. The Court nowhere alluded to (much less relied on) these facts in its discussion, nor did it draw any conclusions from them.

In fact, there is virtually nothing in the Court's discussion that even relates to the liability *vel non* of the public employer. To be sure, *Hudson* did state in a footnote, "Since the agency shop itself is a 'significant impingement on First Amendment rights,' *Ellis [v. Railway Clerks]*, 466 U.S. [435] at 455 [(1984)], the government and union have a responsibility to provide procedures that minimize that impingement and that facilitate a nonunion employee's ability to protect his rights." (*Hudson*, 475 U.S. at 307 n.20.) But there can be no contention either in the present case or in *Foster* that such "procedures" did not exist. In both cases, the union had a plan for *Hudson* compliance that addressed all three obligations imposed by that decision: the provision of "an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." (*See Hudson*, 475 U.S. at 310.)

The claims in the present case (as in *Foster*) were not that the union did not provide such an explanation, challenge procedure and escrow, but that the *details* of these measures did not fully comply with the union's *Hudson* obligations, e.g., whether the *Hudson* notice that was admittedly sent to fee payers was audited, whether the agency fee challenge procedure established was sufficiently prompt, and whether the portion of the agency fee that was admittedly escrowed

was high enough.[6] Nowhere does *Hudson* hold that the public employer can be held liable for such flaws in the *details* of the union's implementation of its *Hudson* compliance plan, as opposed to a situation in which no such plan exists. And *Foster* is in accord:

> The plaintiffs do not argue that no plan [for *Hudson* compliance] was in place; they have merely demonstrated that they received an inadequate notice. [¶] Although employers certainly owe nonunion member employees the general duty set forth in *Hudson* of ensuring that procedures exist "that minimize impingement and that facilitate a nonunion employee's ability to protect his rights," *Hudson*, 475 U.S. at 307 n.20, they owe no specific duty to employees to ensure that a proper *Hudson* notice is received by each employee before agency fees are deducted.

(*Foster*, 268 F.3d at 694.) Thus, there is no conflict between *Hudson* and *Foster*.

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[6] As Kathryn Libicki testified in her deposition, the public employer did make sure that the union had abided by the plan for *Hudson* compliance:

> [O]ur responsibility was to ensure that in fact [the union] provided those things that I identified and in fact these documents show that they gave notice to the employees. They identified chargeable versus non-chargeable expenses. They set up an escrow account and a procedure for challenge.

ER 170:7-13.

Nor, as a policy matter, would it make sense to require the public employer to police the details of the union's compliance with its *Hudson* obligations. The public employer is particularly ill-suited to intervene in the dispute between the union and its agency fee payers regarding the details of the union's *Hudson* compliance because well-established public policy prohibits public employers from interfering in the internal affairs of the unions that represent their employees. *See, e.g.*, California Government Code §§3519(d), 3543.5(d), §3571(d).

Consistent with these statutory mandates, the California Public Employment Relations Board ("PERB") – the state agency charged with interpreting and enforcing public employment bargaining laws including the foregoing provisions[7] – has promulgated regulations specifying that the union, not the public employer, is responsible for informing the employees of the amount and basis for calculating the agency fee, as well as of the procedure for challenging it. (8 California Code of Regulations § 32992.) Moreover, PERB has also specifically held that imposing such a duty on the employer would conflict with the statutory prohibition on interference with the union's affairs. (*San Ramon Valley Unified School Dist. (Abbot)*, PERB Decision No. 751, 13 P.E.R.C. ¶ 20201 at p. 732 (1989); *accord Sweetwater Union High School District (Gerber)*, PERB Decision No. 1417, 25 P.E.R.C. ¶ 32024 (2001).)

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[7] *See, e.g.*, California Government Code §§ 3541 (establishing PERB); 3541.3(g) (authorizing PERB "to adopt . . . rules and regulations to carry out the provisions and effectuate the purposes and policies of this chapter").

As PERB held in *Abbot*, the position espoused by petitioners here "is incompatible with the entire notion of collective bargaining," because "[t]he 'arm's length' relationship required by collective bargaining recognizes that the employer and the union have conflicting interests" which "obviously render unworkable any scheme where the employer must police the union's actions, lest it be held liable for them." (*Abbot*, 13 P.E.R.C. ¶ 20201 at p. 732.) Moreover, as PERB also recognized, there are "practical reasons why creating such a duty [as to the employer] makes little sense," such as the fact that "[a] public . . . employer simply does not have the authority or resources to review union procedures and determine if they are statutorily or constitutionally adequate." (*Id.*)

The reasoning of *Abbot* is compelling. The public employer's role in the agency fee context is limited to deducting the fees and transmitting them to the unions; the employers retain no more control over the fees than they do over payroll deductions that they may make for the United Way or for other charitable organizations. The unions act alone and in their own interest in determining the purposes for which agency fees shall be spent, the form and content of their *Hudson* notices, and the procedures that comprise the agency fee arbitration and escrow. Moreover, public employers lack the information and expertise to look over the unions' shoulders and review the legality of their agency fee procedures. For these reasons, *Foster*'s holding that a public employer incurs no legal duty to police the details of the union's compliance with *Hudson* merely by making routine agency fee payroll deductions is not only consistent with *Hudson*, but moreover is supported by public policy.

II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH OPINIONS FROM THE THIRD AND SIXTH CIRCUITS UPON WHICH PETITIONERS RELY.

Contrary to petitioners' argument, there is no conflict between the Ninth Circuit's resolution of the standing issue and either of the Sixth and Third Circuit decisions on which plaintiffs rely, *Weaver v. Univ. of Cincinnati*, 970 F.2d 1523 (6th Cir. 1992), and *Hohe v. Casey*, 956 F.2d 399 (3d Cir. 1992). Neither of those cases expressly addressed the standing issue.[8] Although petitioners cite authority to the effect that federal courts have an *obligation* to address standing (*see* Pet. at 22-23), that is a far cry from authority holding that one can assume from a federal court's resolution of the merits of an issue that it has *implicitly* addressed and resolved the standing issue. In fact, settled authority is plainly to the contrary. Thus, the Court has "repeatedly held that the existence of unaddressed jurisdictional defects has *no precedential effect*." (*Lewis v. Casey*, 518 U. S. 343, 352 n. 2 (1996) (emphasis added). *See also Pennhurst State Sch. & Hosp. v. Halderman*, 465 U. S. 89, 119 (1984) (quoting *Hagans v. Lavine*, 415 U. S. 528, 533 n. 5 (1974)) ("'[W]hen

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[8] Contrary to plaintiffs' attempt to portray the district court's decision in *Hohe*, 740 F. Supp. 1092, 1098-99 & n.5, that court did *not* address the issue of fee payers' standing to challenge the agency fee indemnification provision. Rather, that decision held that its resolution of the merits of various of the claims rendered it unnecessary to *reach* the challenge to the indemnification provision. This clearly was not a decision that the plaintiffs lacked *standing* to bring such a challenge, but rather was an express and straightforward application of the jurisprudential rule of avoiding the resolution of constitutional questions that are not necessary to the outcome of the case. (*See id.* at 1098.)

questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issues before us'").)

Second, the same is true of the prior Ninth Circuit case that petitioners cite, *Knight v. Kenai Peninsula Borough Sch. Dist.*, 131 F.3d 807, 817 (9th Cir. 1997), *cert. denied sub nom Anchorage Educ. Ass'n v. Patterson*, 524 U.S. 904 (1998). In *Knight*, the Ninth Circuit had no occasion to consider whether the agency fee payers had demonstrated sufficient injury, causation, and redressability to establish standing. Instead, *Knight* held the challenge unripe because it was based upon "factual assertions that cannot be assessed on the current record" and because no action had yet been taken against the plaintiff. (*Knight*, 131 F.3d at 814.) The court's statement that the plaintiff's factual assertions were incapable of assessment demonstrates that the standing question, which depended upon such facts, could not have been resolved in that case. Moreover, plaintiffs in the present case acknowledged in the Ninth Circuit that the standing issue was not raised at all on appeal in *Knight*. (*See* Appellants' Opening Ninth Circuit Brief at 33, n. 10.) As such, *Knight* cannot be considered to have any precedential effect with regard to the standing issue, under the authority cited in the prior paragraph.

III. WHATEVER CONFLICT EXISTS BETWEEN THE COURT OF APPEALS' DECISION AND THE TENTH CIRCUIT'S OPINION IN *WESSEL* IS INSUFFICIENT TO WARRANT REVIEW.

Petitioners' final claim of a conflict that would justify this Court's review is the juxtaposition of this case with the Tenth Circuit's 2 to 1 opinion in which the majority reached

a different conclusion for the wrong reasons: *Wessel v. City of Albuquerque*, 299 F.3d 1186 (10th Cir. 2002).

Wessel did not, however, consider and reject the Ninth Circuit's decision from which plaintiffs now seek *certiorari*. Rather, *Wessel* considered only the prior Ninth Circuit decision in this case, which was vacated. *(See Wessel*, 299 F.3d at 1199 n.3.) Further, since the conflict is only at present between two circuits, the Court should permit other circuits an opportunity to consider the issue, because "experience with conflicting interpretations of federal rules [of law] may help to illuminate an issue before it is finally resolved and thus may play a constructive role in the lawmaking process." (Justice Stevens, *Some Thoughts on Judicial Restraint*, 66 Judicature 177, 183 (1982); *see also id.* ("The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result").)

As Justice Stevens also observed in *McCray v. New York*, 461 U.S. 961, 962 (1983), in which the Court denied a petition for a writ of *certiorari*, "[F]urther consideration of the substantive and procedural ramifications of the problem by other courts will enable [the Supreme Court] to deal with the issue more wisely at a later date."

Moreover, *Wessel*'s resolution of the standing issue is pure *ipse dixit* and on its face reveals the fatal flaw in its analysis. The majority opinion's discussion of the standing issue, which consists merely of a one paragraph footnote, reads as follows in its entirety:

> A previous Ninth Circuit panel declined to reach the issue presented in this case, concluding that the objecting employee lacked

> standing because "[w]hile it can be assumed that [he] suffered some injury when the fees were deducted from his paycheck . . . . He certainly cannot show any connection between the indemnification agreement and that injury." (*Prescott v. County of El Dorado*, 177 F.3d 1102, 1112 (9th Cir. 1999), *vacated on other grounds*, 528 U.S. 1111, 120 S.Ct. 929, 145 L.Ed.2d 807 (2000).) Although standing has not been raised as an issue by the parties in this case, we disagree with the Ninth Circuit's analysis. The alleged injury results from the indemnification provision's negation of any incentive for the City to ensure that the *Hudson* requirements were followed. The nonmembers' entire argument presumes that, if the City faced potential liability, it would have prevented the fair share fees from being deducted unconstitutionally from the non-members' paychecks.

(*Wessel*, 299 F.3d at 1199 n.3.)

The crux of the *Wessel* majority's resolution of the standing issue is contained in the final sentence quoted above, "The nonmembers' entire argument *presumes* that, if the City faced potential liability, it would have prevented the fair share fees from being deducted unconstitutionally from the non-members' paychecks." (*Id.*; emphasis added.) The fatal flaw in this analysis is apparent: it is the plaintiffs' burden to *prove* their standing, not merely to presume it:

> The party invoking federal jurisdiction bears the burden of establishing the[] elements [of standing]. *See FW/PBS, Inc. v. Dallas*, 493

U.S. 215, 231 (1990); *Warth* [*v. Seldin*, 422 U. S. 490], 508 [(1975)]. Since they are not mere pleading requirements, but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation. *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 883-889 (1990); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 114-115, and n. 31 (1979); *Simon* [*v. Eastern K. Welfare Rights Organization*, 426 U.S. 26], 45, n. 25 [(1976)]; *Warth*, *supra*, at 527, and n. 6 (Brennan, J., dissenting). At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss, we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *National Wildlife Federation*, *supra*, at 889. In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," Fed. Rule Civ. Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be "supported adequately by the evidence adduced at trial." *Gladstone*, *supra*, at 115, n. 31.

(Lujan v. Defenders of Wildlife, 504 U. S. 555, 561 (1992).)

The *Wessel* decision, which reviewed a summary judgment, neither cites nor analyzes any "specific facts," set forth "by affidavit or other evidence" (*id.*) proffered by the plaintiffs to satisfy their burden of proof as to standing, i.e., any evidence that the City would have ceased deducting fair share fees absent the indemnification provision. Instead, the Tenth Circuit does precisely what the Supreme Court has held cannot be done: it *presumes* standing on the basis of "mere allegations." *Id.* The Tenth Circuit's error as to the standing inquiry was most likely influenced by the absence of any briefing by the parties on that issue, as the court noted that "standing ha[d] not been raised as an issue by the parties in th[e] case." (*Wessel*, 299 F.3d at 1199 n.3.) A preferred, if not the *proper*, procedure would have been for the court to request briefing on that issue, rather than decide it without the benefit of briefing. (*See, e.g., Arizonans for Official English v. Arizona*, 517 U.S. 1102 (1996) (directing the parties to brief the issue of whether "petitioners have standing to maintain this action," in "addition to the questions presented by the petition [for *certiorari*]").)

In light of the aforementioned errors surrounding the *Wessel* opinion, it is entirely possible that permitting this issue to "percolate" in the lower courts will obviate the need for this Court to resolve any perceived conflict between *Prescott II* and *Wessel*, because circuits which consider this issue in the future may likely note these palpable errors in *Wessel*.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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No. 02-686

IN THE

Supreme Court of the United States

OCTOBER TERM, 2002

STEVEN PRESCOTT; ROBERT F. BERRY; CHERYL JONES; KAREN PIERCE; AND CHRISTINE M. TURNEY,

Petitioners,

v.

COUNTY OF EL DORADO; SHARON LIBICKI; AND EL DORADO COUNTY EMPLOYEES ASSOCIATION, LOCAL NO. 1,

Respondents.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

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PETITIONERS' REPLY BRIEF

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February 2003

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ARGUMENT

Casting all of their eggs in one basket, Respondents ignore and apparently concede the serious conflicts among the Circuits as to the second question presented. Petition ("Pet.") at i, ¶ II and 23-28. However, they dispute virtually every particular as to the first question presented. Pet. at i, ¶ I; Respondents' Brief in Opposition ("Opp.") at 4-5.[1]

As to the facts, like the panel below, Respondents focus upon negotiation of the forced-unionism agreement, ignoring that the indemnification clause also caused Respondents County and Libicki to **enforce** the agreement by seizing agency fees from Petitioners. Opp. at 6; *but see* Appendix ("App.") C at 12a (emphasis added) (District Court's factual finding that "Absent the hold harmless clause, the County Defendants would not have entered into **or enforced** an agreement including a provision requiring union membership, or in lieu of union membership, payment of an agency fee.").[2] Coupling misidentification of the injurious action (the County's seizure of agency

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[1] A substantively identical question was presented in this case's first Petition, *see* Petition in Case No. 99-519 at i, in which this Court granted *certiorari*, vacated, and remanded. 528 U.S. 1111 (2000).

[2] Respondents nonsensically assert that the stipulation "makes the instant case an extremely poor vehicle to resolve the issue" because it renders the case "*sui generis*." Opp. at 12. The stipulation merely states the obvious as to why the indemnification clause exists. *See Stamford Bd. of Educ. v. Stamford Educ. Ass'n*, 697 F.2d 70, 74 (2d Cir. 1982) ("the logical reason why the contract contained a 'hold harmless' clause was because at least one of the parties (probably, the [indemnitee]), thought that there was a good chance that [the actions taken under the clause] in the Agreement would be held [illegal]"); *see also Wessel v. City of Albuquerque*, 299 F.3d 1186, 1199 n.3 (10th Cir. 2002) ("The alleged injury results from the indemnification provision's negation of any incentive for the City to ensure that the *Hudson* requirements were followed"), *citing Teachers Local No. 1 v. Hudson*, 475 U.S. 292, 310 (1986).

fees), with studied disregard of this pertinent fact, Respondents deny with sophistry the "affirmative link between the policy and the particular constitutional violation alleged," *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985).

At the same time, Respondents concede the retrospective relief available with a favorable judgment, though disingenuously claiming Petitioners did not seek it. It is of no moment that Petitioners did not explicitly "seek an order requiring the public employer . . . to *repay* to the union . . . any funds it had received pursuant to the indemnification agreement." Opp. at 13-14. In fact, they never had opportunity to, as lower courts never reached the remedial issue. Moreover, Petitioners sought "Such other and further relief as the Court may deem just and proper." Record ("R.") 1: Complaint at 12. This is sufficient to preserve their standing to seek disgorgement. *See Ellis v. Railway Clerks*, 466 U.S. 435, 442 & n.5 (1984) ("generalized claim for 'monetary damages . . .'" includes claim for interest); *see also Bloom v. National Labor Relations Board*, 153 F.3d 844, 848 (8th Cir. 1998) (claim for interest sufficient to preserve standing), *cert. granted, vacated, and remanded on other grounds*, 525 U.S. 1133 (1999).

The Record demonstrates that the County and Libicki have received legal counsel paid for by the union. R. 8; R. 90, ¶ 41. Thus, an appropriate remedy would require the County to reimburse the union for this representation. Moreover, the County Respondents would be liable for Petitioners' potential attorneys' fees and costs under 42 U.S.C. § 1988. Respondents ignore that the Record includes a discussion of remedies, and the potential for an order prohibiting the union from charging nonmembers for County Respondents' costs in defense of their lawsuit. R. 96 at 5-7.

Equally disingenuous is Respondents' claim that its "full refund of [Petitioners'] fees," "settle[s] the monetary aspect of this case." In fact, the Record demonstrates the on-going collective bargaining relationship between the County and the union, the on-going forced-unionism agreement, and the re-initiation of fees seizures on remand after the first appeal. R. 77 (order denying preliminary injunction). Coupled with the union's treatment of its costs in defense of Petitioners' lawsuit as "chargeable" to nonmembers, R. 90, Exhibit 3 at 2; R. 93 at 6 n.15 (defending treatment of such expenditures as "chargeable" to nonmembers), there is no genuine dispute that Petitioners possess sufficient legal interest to challenge the enforceability of the indemnification clause, and that the courts can enter effective relief granting them substantial economic benefits.

Most importantly, Respondents fail to cite even a single case conflicting with the axiomatic principle that public employees possess standing to challenge the constitutionality of one of their terms and conditions of employment. This is because the decision below, App. A at 1a-5a, stands alone in its disposition of the standing issue generally, and as specifically applied to indemnification clauses, and is in conflict with virtually every analogous authority. There is, likewise, deep conflict among the Circuits on the substantive second question presented. Therefore, the Petition should be granted as to both questions presented.

I. *Certiorari* Should Be Granted Because the Panel's Decision Conflicts with This Court's and Other Circuits' Decisionmaking on the Injury to Nonmembers.

Respondents assert that the dual conflicts between the decision below, App. A at 1a-5a, and decisions of this Court

and other circuits on the first question presented, Pet. at i, ¶ 1, & at 9-22, are illusory. They are, unsurprisingly, comfortable with the radical abstraction of the lower courts' analysis of Petitioners' injury. By confusing "the constitutional requirements for the . . . collection of agency fees," *Hudson*, 475 U.S. at 310, with the public employer's action injuring nonmembers' constitutional rights (seizure of agency fees),[3] Respondents confuse a union's defiance of *Hudson* with the injury to First Amendment rights visited upon nonmembers whenever forced-unionism agreements are enforced.

Respondents answer the demonstrated conflict with this Court's forced-unionism jurisprudence, Pet. at 12-16, by broadly asserting that *Abood v. Detroit Board of Education*, 431 U.S. 209, 232 (1977), "makes clear" that "the First Amendment is not violated by implementation of" a forced-unionism agreement. Opp. at 8, *citing Hudson*, 475 U.S. at 301. However, *Abood* "makes clear" no such thing. To the contrary, quoting *Abood*, *Hudson* reaffirms that:

> requiring nonunion employees to support their collective-bargaining representative **"has an impact upon their First Amendment interests,"** *id.*, at 222, and may well "interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit," *ibid.* *See also id.*, at 255 (POWELL, J., concurring in judgment).

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[3] Respondents state that the injury was the union's "failure to provide [nonmembers] with adequate notice of the basis of the agency fee and to maintain a sufficient portion of collected fees in escrow pending fee arbitrations." Opp. at 7, *citing* Pet. at 3a. This seriously understates the deficiencies adjudicated. *See Prescott v. County of El Dorado*, 915 F. Supp. 1080, 1085-91 (E.D. Cal. 1996).

475 U.S. at 301 (emphasis added).

Thus, what *Abood* and *Hudson* make clear is that, absent compliance with *Abood*'s substantive limitations and *Hudson*'s procedural prerequisites, the First Amendment is violated by implementation of a forced-unionism agreement.

Like the decisions below, Respondents' Opposition boils down to the irrational proposition that nonmembers are injured by a piece of paper—the contents of a union's notice and procedure under *Hudson*. This conflicts with this Court's unambiguous holding that the public employer's seizure of agency fees injures nonmembers' rights. *Abood*, 431 U.S. at 222; *Hudson*, 475 U.S. at 301, 309; *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866, 876 n.4 (1998), as well as the decisions of other Circuits. *Wessel*, 299 F.3d at 1199 n.3 (injury caused by seizure of fees); *see also* Pet. at 16-17, *and cases cited therein.*[4]

This Court's bedrock principle likewise conflicts with the underlying theory of the decisions below—that the nonmembers had to demonstrate that the indemnification clause caused the inadequacies in the union's notice and procedures. Respondents' argument is nothing less than a studied effort to confuse the vaccination (notice and procedures) with the disease (unconstitutional seizure of agency fees) such prophylactic measures are intended to prevent.

Equally futile is Respondents' effort to defend the merits of the decision below by a "but-for" analysis and discussion of cases in which this Court rejected attenuated theories of liability

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[4] Concomitantly, absent actual or threatened agency fee seizures or discharge for nonpayment, nonmembers are not injured merely by the contents of a union's notice, which by itself is a harmless piece of paper.

under 42 U.S.C. § 1983 that challenged municipal policies "several steps removed" from the injurious action. Opp. at 8-13. A challenge to a municipality's establishment of a police force in an excessive force action, *Tuttle*, 471 U.S. at 823, cannot compare to this challenge to entry into an indemnification agreement without which the public employer would not have entered into the forced-unionism provision and—more importantly—would not have seized agency fees. App. C at 12a. The indemnification clause here was not the proverbial West African butterfly flapping its wings, causing the breeze ultimately resulting in the formation of Hurricane Andrew, or any other kind of contrivedly colorfully-overstated "Rube Goldberg contraption . . . too attenuated and speculative to support standing." Opp. at 11. As both the Sixth and the Second Circuits have recognized, it is a clause without which the forced-unionism agreement would not exist. *Weaver v. University of Cincinnati*, 970 F.2d 1523, 1537 (6th Cir. 1992); *Stamford*, 697 F.2d at 73-74. Here, it is a clause without which the forced-unionism agreement would neither exist **nor** be enforced. App. C at 12a.

Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 42-45 (1976), is not helpful to Respondents' analysis. *Simon* rejects a challenge to Treasury officials' ruling granting favorable tax treatment to hospitals denying non-emergency services to indigents, alleging that it "encouraged" denial of such services. But neither the hospitals nor their officials were joined in the action, and *Simon* addressed a circumstance in which the sued Treasury officials had no legal duty to the plaintiffs. *Id.* Here, in contrast, this Court already has held that "the government and union have a responsibility to provide procedures that minimize th[e] impingement [on First Amendment rights] and that facilitate a nonunion employee's ability to protect his rights." *Hudson*, 475 U.S. at 307

n.20. Moreover, this suit joins the County and Libicki, alleging that **they** enforced the forced-unionism agreement and therefore violated Petitioners' constitutional rights.

Finally, perhaps the most outlandish section of the Opposition is devoted to discussion of *Foster v. Madhesian*, 268 F.3d 689 (9th Cir. 2002). Contrary to Respondents' comments, it is not inappropriate to discuss the errors of another Ninth Circuit decision relied upon by the panel below. Neither is it relevant that the charitable legal-aid organization employing Petitioners' counsel employed counsel for the litigants in *Foster*.

Denial of the *Foster* petition, Opp. at 14, does not foreclose review here. The United States Reports are filled with denials of petitions where this Court, shortly thereafter, accepted for review cases raising similar or identical issues. Respondents' suggestion otherwise evidences a fundamental misapprehension of this Court's rules. *See* S. Ct. Rule 10 ("Review on a writ of certiorari is . . . a matter . . . of judicial discretion.").

II. The Court Should Grant *Certiorari* Because There Is Conflict Among the Courts of Appeals Concerning Employees' Standing to Challenge the Validity of Provisions of Collective Bargaining Agreements Governing Their Terms and Conditions of Employment.

Respondents doubtlessly recognize the difficulty in maintaining that Petitioners lack standing, when no other court has noticed or even mentioned this fatal jurisdictional defect in any decision addressing identical challenges by similarly-situated litigants. Indeed, Respondents' task is made doubly difficult because the "standing" issue was not one they raised below. App. G at 65a (raising question *sua sponte*). Respondents deny conflict between the decision below, App. A at 1a-

5a, and those of the Third and Sixth Circuits.[5] They note that none "expressly addressed the standing issue," Opp. at 21, and vigorously argue that Petitioners' argument is foreclosed by this Court's decisions noting that "the existence of unaddressed jurisdictional defects has *no precedential effect*." Opp. at 21 (original emphasis; citations omitted).

Respondents overlook the fact that this Court applies this rule only in **its own decisionmaking**. *Pennhurst State Sch. & Hospital v. Halderman*, 465 U.S. 89, 119 (1984) ("[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, **this Court** has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us") (emphasis added), *quoting Hagans v. Lavine*, 415 U.S. 528, 533, n.5 (1974); *see also Will v. Michigan Dep't of State Police*, 491 U.S. 58, 63 n.4 (1989) (same). But that is not the Ninth Circuit's rule. *Alpine Ridge Group v. Kemp*, 955 F.2d 1382, 1385 (9th Cir. 1992) (because court decided the case, "it must necessarily have determined that jurisdiction was proper"), *rev'd on other grounds sub nom. Cisneros v. Alpine Ridge Group*, 508 U.S. 10 (1993).

Thus, Respondents' attempt to reconcile the conflict between this case and the Ninth Circuit's earlier decision in *Knight v. Kenai Peninsula Borough School District*, 131 F.3d 807, 817 (9th Cir. 1997), is unavailing. The Ninth Circuit has specifically adopted—for its own decisionmaking—the "implicit standing" doctrine rejected by this Court. *Stahl v. Gibraltor Financial Corp.*, 967 F.2d 335, 337-39 (9th Cir. 1992). Thus, that this Court does not consider itself bound when a subsequent case brings an unaddressed jurisdictional

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[5] *Weaver*, 970 F.2d at 1538; *Hohe v. Casey*, 956 F.2d 399 (3d Cir. 1992).

issue before it does not render *Weaver* and *Hohe* in harmony with the Ninth Circuit's decision below.

Moreover, Respondents erroneously assert that *Hohe* "did *not* address the issue of fee payers' standing to challenge the agency fee indemnification provision." Opp. at 21 n.8, *but see* App. E at 43a n.7 (original panel decision stating that *Hohe* "suggested that there was standing, but did not decide the issue"). In fact, *Hohe* reversed an explicit finding that non-members lacked standing to challenge a similar indemnification clause, 956 F.2d at 412, *rev'g* 740 F. Supp. 1092, 1098 (M.D. Pa. 1989), and ruled against nonmembers on the **merits** of their claim. Respondents miscast *Hohe* as a decision that merely applied "the jurisprudential rule of avoiding the resolution of constitutional questions that are not necessary to the outcome of the case." Opp. at 21 n.8.

Equally baseless is Respondents' denial that the decision below conflicts with the Tenth Circuit's decision in *Wessel*. Respondents' dismissive characterization of the decision on the standing question ("pure *ipse dixit*," Opp. at 23) is absurd. The Tenth Circuit explicitly held that "we disagree with the Ninth Circuit's [standing] analysis." *Wessel*, 299 F.3d at 1199 n.3.[6]

Respondents' suggestion—that the petition should be denied to "permit other circuits an opportunity to consider the issue," Opp. at 23—also is disingenuous. Contrary decisions on employees' standing to challenge indemnification provisions in forced-unionism agreements have been rendered by three other Circuits (Third, Sixth, and Tenth), and by another panel of the

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[6] It then said, contrary to the Third Circuit in *Hohe*, but in accord with the Sixth Circuit in *Weaver*, "we . . . hold that the indemnification provisions are void as contrary to public policy." *Wessel*, 299 F.3d at 1199; *see* Pet. at i, ¶ II and at 23-29.

Ninth Circuit itself, in *Knight*. *See* Pet. at 20-23. This is sufficient to warrant review in light of the seriousness of both of the questions presented. *See Communications Workers of America v. Beck*, 487 U.S. 735, 741-42 (1988) (conflict between two circuits sufficient to warrant review concerning validity of common term of collective bargaining agreements).

CONCLUSION

For the reasons stated above, this petition for a writ of *certiorari* should be granted, and the case set for plenary briefing and argument on the important questions presented herein.

Respectfully submitted,

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